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CHARLES ELMORE GROFFLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 358

STATE OF MINNESOTA,

Petitioner,

vs.

**TRUSTEES OF THE HAMLINE UNIVERSITY OF
MINNESOTA, A CORPORATION,**

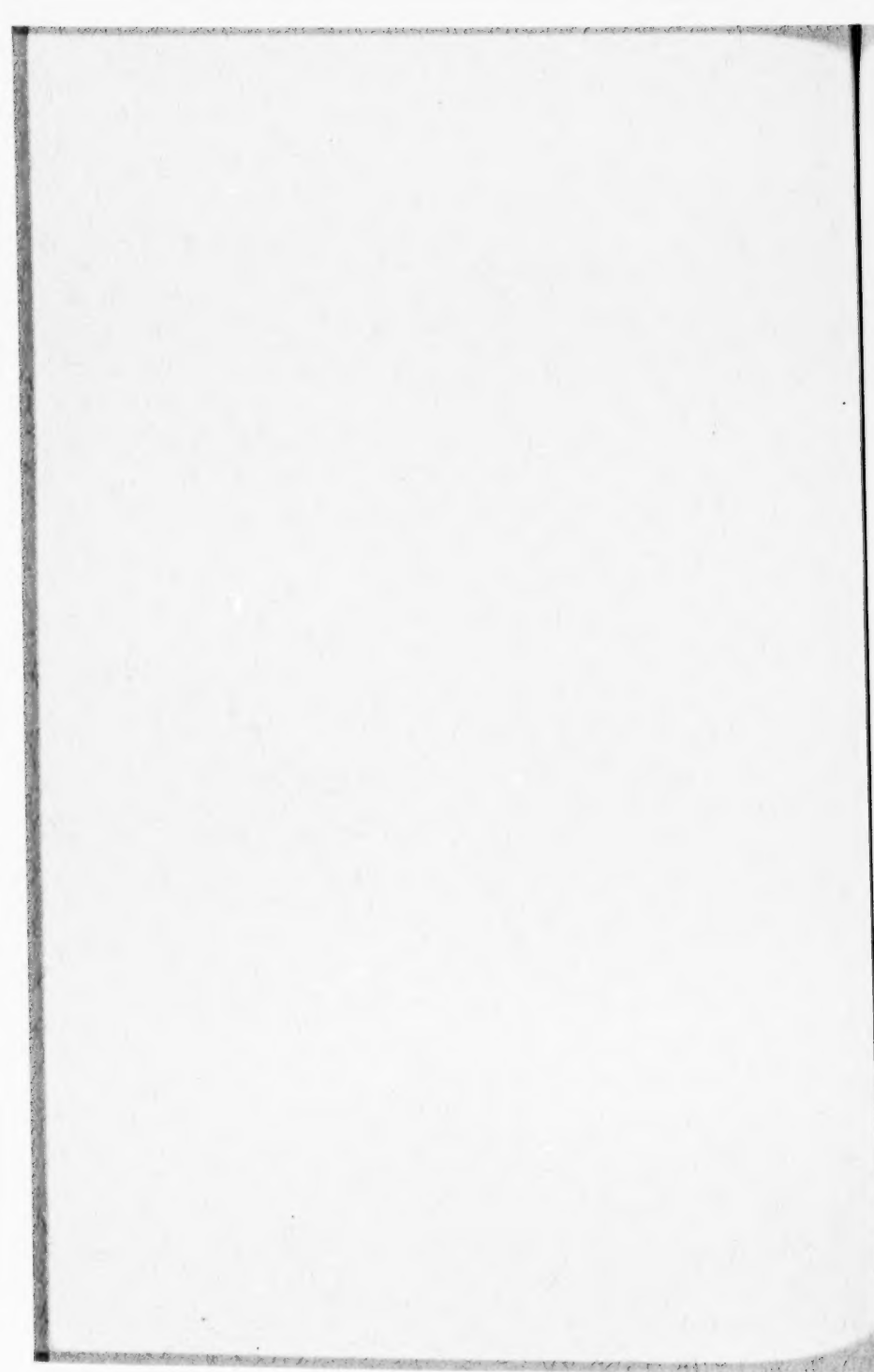
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA
AND SUPPORTING BRIEF.**

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vs.

TRUSTEES OF THE HAMLINE UNIVERSITY OF
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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA.**

*To the Honorable The Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, the State of Minnesota, hereby petitions for review on writ of certiorari of the decision and judgment of the Supreme Court of Minnesota, being the court of last resort of that State, and respectfully shows:

Summary and Short Statement of the Matters Involved.

Respondent, the Trustees of the Hamline University of Minnesota, was created a corporation by Chapter 43, Laws of the Territory of Minnesota for 1854. It was organized

for the purpose of "establishing, maintaining and conducting" an institution of learning of college rank, was given the right of perpetual existence and by the expressed terms of the charter "all corporate property belonging to the institution, both real and personal is, and shall be free from taxation" (R. 22, 99-105 incl.).

The Territory of Minnesota was organized by Act of Congress of March 3, 1849 (R. 22, 97, 98). A Constitution for the State of Minnesota was adopted in 1857 subjecting all property to taxation on a uniform basis except certain classes expressly exempted (R. 22, 23, 125, 126). In 1858 by Act of Congress the State, upon approval of the Constitution, was admitted into the Union "on an equal footing with the original states in all respects whatever" (R. 22, 124, 125).

Respondent established a preparatory department at Red Wing in 1854 (R. 26) and opened a college course in 1857 (R. 27). The teaching functions of the University were suspended from March, 1869 to September, 1880 (R. 68, 69). During this period the trustees met regularly each year, held special meetings to carry on the work necessary to relocate the institution, to construct new buildings and generally to transact such other business as might be relevant to the reopening of the school (R. 69). The school at Red Wing was abandoned, and the property was deeded back to the City of Red Wing in 1872 (R. 73). On September 22, 1880, the respondent resumed its teaching functions which have been continued to date at its present location in St. Paul (R. 87).

Respondent instituted the present action to register title to certain real estate, described in the application, which is rented for residential purposes (Minnesota Statutes 1941, Ch. 508, as amended). The net rental therefrom has been and is being used for endowment fund purposes and the

real estate is not otherwise used by respondent for educational purposes (R. 96).

Petitioner, State of Minnesota, contested the action on the ground that the real estate had forfeited to the State for non-payment of taxes levied and assessed for the year 1932, thereby vesting title thereto in the State (R. 13).

It was stipulated at the trial that the proceedings for forfeiture of the real estate for non-payment of taxes as set forth in the Answer of the State of Minnesota were had in accordance with the laws of the state and would vest title in the State unless the real estate was exempt from taxation as alleged in respondent's Reply (R. 96).

The Reply alleged that the real estate was exempt from taxation by virtue of its charter, Chapter 43, Laws of the Territory of Minnesota for 1854 (R. 15). Chapter 43 endowed the corporation with perpetual existence (R. 100), and further provided as follows: "Sec. 11 * * * and all corporate property belonging to the institution, both real and personal is, and shall be free from taxation" (R. 104). The Reply further alleged that the exemption provision constituted a contract, the obligation of which is protected against impairment by provisions of Article 1, Sec. 10 of the Constitution of the United States and Article 1, Sec. 11 of the Constitution of the State of Minnesota (R. 21).

The court of first instance (District Court of Hennepin County, Minnesota) held that the State's tax judgment and forfeiture proceedings were null and void on the ground that when the taxes were levied and assessed the property was exempt from taxation under the foregoing territorial charter provision which the court held to be a contract, the obligations of which are protected against impairment by the State of Minnesota by Article 1, Sec. 10 of the United States Constitution (R. 166, 169). Upon appeal to the Supreme Court of the State of Minnesota the decision of the lower court was affirmed.

Jurisdiction.

Jurisdiction is conferred upon this Court to review the decision and judgment of the Supreme Court of Minnesota by writ of certiorari under Sec. 237 (b) of the Judicial Code (28 U. S. C. A. Sec. 344(b)).

The exemption, if valid, exists only by virtue of Chapter 43, Laws of the Territory of Minnesota for 1854. Income-producing property such as that here involved is not exempt under the constitution and statutes of the State of Minnesota. *State v. Carleton College*, 154 Minn. 280, 191 N. W. 400; *Trustees of Pillsbury Academy v. State*, 204 Minn. 365, 283 N. W. 727, aff'd per curiam, 308 U. S. 506, 60 S. Ct. 92, 84 L. E. 433. Such an exemption could not have been granted by the legislature of the State. *State v. Great Northern Railway Company*, 106 Minn. 303, 119 N. W. 202; *Great Northern Railway Company v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446.

The construction of an Act of Congress prescribing the authority of a territorial legislature, together with its enactments herein set forth, presents a proper and substantial question for review. *Welch v. Cook*, 97 U. S. (VII Otto) 541, 24 L. E. 1112; *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114, 60 L. E. 327.

A Federal right is involved in determining whether the act of the territorial legislature and its acceptance constitutes a contract protected by Article 1, Sec. 10 of the Constitution of the United States. Especially is this true where the validity of the territorial act is challenged on the ground that it violates the Constitution of the United States. The passage of Chapter 43, Laws of the Territory of Minnesota for 1854 was the exercise of an authority under a power derived from the United States. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 S. Ct. 1, 51 L. E. 78.

Also necessarily involved is the validity of certain constitutional and statutory provisions of the State of Minnesota as applied to the property of the respondent. The validity of these was challenged on the ground that if they were construed to subject respondent's income-producing property to taxation, the obligation of contract would be impaired. *Millsaps College v. City of Jackson*, 275 U. S. 129, 48 S. Ct. 94, 72 L. E. 196.

Your petitioner made and filed in the court of first instance a written Motion for Dismissal on the ground that the exemption provision of Chapter 43 of the Laws of the Territory of Minnesota for 1854 was null and void under the constitution and statutes of the United States and the State of Minnesota (R. 140-144 incl.). The Motion for Dismissal directly challenged the power of the territorial legislature to (1) grant an exemption in perpetuity of property based solely on ownership, (2) contract away the right of taxation, (3) make an irrevocable contract of exemption, and (4) limit the right of the future state to tax.

The particular Federal constitutional and statutory provisions involved are:

1. Article 1, Secs. 8 and 9 of the Constitution of the United States.
2. Fifth Amendment to the Constitution of the United States.
3. Tenth Amendment to the Constitution of the United States.
4. The Act of Congress of March 3, 1849 (Organic Act of Minnesota):

"Sec. 6. And be it further enacted, That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution

of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

5. Act of Congress of May 11, 1858 (Act of Admission):

"* * * That the state of Minnesota shall be one, and it is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

The particular constitutional and statutory provisions of the State of Minnesota involved are:

(1) Article 9 of the State Constitution as adopted in 1857 and as amended in 1906, subjecting all property to taxation on a uniform basis except certain classes expressly exempted.

(2) Secs. 272.01 and 272.02, Minnesota Statutes 1941, as amended, (Secs. 1974 and 1975, Mason's 1927 Minnesota Statutes, as amended), subjecting all real and personal property to taxation except certain classes expressly exempted.

The same constitutional and statutory objections urged in the court of first instance were raised by assignments of error and argument on appeal to the State Supreme Court.

The decision of the lower court was affirmed by the Supreme Court of the State of Minnesota in an opinion filed May 19, 1944 and is reported in — Minn. —, 14 N. W. (2d) 773.

The judgment sought to be reviewed was entered in the Supreme Court of Minnesota on the 31st day of May, 1944.

The date of application for the writ may be taken as the date the petition is filed in the office of the Clerk of this Court.

Questions Presented.

FIRST: Was it within the power of the territorial legislature under the provisions of the Constitution of the United States and the Act of Congress of March 3, 1849 (Organic Act of Minnesota) hereinbefore set forth to grant an irrevocable exemption is perpetuity based solely on ownership of property by the respondent?

SECOND: Did the grant of exemption constitute a contract binding on the State of Minnesota?

THIRD: Did the Act of Congress of May 11, 1858 admitting the State of Minnesota into the Union on an equal footing with the original states in all respects whatsoever operate to abrogate or repeal the charter grant of exemption?

FOURTH: Is the State of Minnesota obliged to recognize the charter exemption as valid and binding upon it in spite of the requirements of the constitution of the state that all property, except that specifically exempted by it, shall be taxed?

FIFTH: By its charter the corporation was organized for the purpose of "establishing, maintaining and conducting an institution of learning for the education of both sexes:". The record shows that the teaching functions of the institution were suspended from 1869 to 1880 inclusive (R. 68, 69). In this connection, the question is presented whether respondent forfeited its special privilege of immunity from taxation by not maintaining and conducting an institution of learning during that period of time.

Reasons for Allowance of Writ.

1. This court has never directly passed on the Federal question as to the power of a territorial legislature to grant an exemption similar to the one contained in respondent's charter, nor its effect on the taxing power of a future state. The question though was presented but not decided in *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 L. E. 225, wherein an act of territorial legislature of Washington granting a similar tax exemption to Whitman Seminary was construed by this Court.

2. The Supreme Court of Minnesota in its opinion cited in support of its holding the decisions of this Court in *Home of the Friendless v. Rouse*, 75 U. S. (8 Wall.) 430, 19 L. E. 495, and *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439, 19 L. E. 498. It is the petitioner's position that the doctrine of those cases is not applicable to territorial enactments, and, even as to the power of the states, the decisions are erroneous and should be overruled by this Court. The doctrine has, from the beginning, met with vigorous dissent from a strong minority of this Court and has been vigorously protested by some state courts. See dissenting opinions in *Washington University v. Rouse*, *supra*, and *State Bank of Ohio v. Knoup*, 57 U. S. (16 How.) 369, 14 L. E. 977; *Trustees of Phillips Exeter Academy v. Exeter*, 90 N. H. 472, 11 Atl. (2d) 569, 33 Atl. (2d) 665; *Cooley's Constitutional Limitations*, 8th Ed., Vol. 1, Ch. IX, page 571 and cases cited; *Page on Contracts*, 2nd Ed., Vol. 6, Sec. 3668. Recently this Court has indicated that the *Rouse* cases should be re-examined and re-considered. *Gorman, et al. v. Washington University*, 314 U. S. 604, 62 S. Ct. 301, 86 L. E. 486; 316 U. S. 98, 62 S. Ct. 962, 86 L. E. 1300.

3. It is made clear in all of the decided cases that the rule that a state legislature may bargain away forever its

taxing power is not applicable where either the state constitution prohibits discrimination in matters of taxation or where the state constitution or statute reserves the right to modify, alter, amend or repeal.

As hereinafter discussed, the Organic Act of the Territory of Minnesota and the United States Constitution prohibited discrimination in tax legislation, and Congress reserved the right to modify, alter, amend or repeal the Laws of the Territory. Congress and the State were free to revoke this exemption by respectively enacting the Act of Admission and the State Constitution.

The reasons for prohibiting a state legislature from bargaining away forever the taxing power of the state are even more cogent and persuasive as applied to a territorial legislature. The power of a state to tax is inherent and sovereign as distinguished from a territory whose power to tax is derivative. *Domenech v. National City Bank*, 294 U. S. 199, 55 S. Ct. 366, 79 L. E. 857.

The power to tax has been declared by this Court to be "the most basic power of government." *Wisc. v. J. C. Penny Co.*, 311 U. S. 435, 444, 61 S. Ct. 246, 249, 85 L. E. 267. It should be determined whether a territorial legislature, as an agency of Congress, can deprive a state from exercising this basic power.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court.

The opinion of the Supreme Court of Minnesota is reported in 14 N. W. (2d) 773. It appears in the printed record, pages 266 to 278 inclusive.

II.

Jurisdiction and Statement of Case.

Reference is hereby made to the foregoing Petition under the headings "Summary and Short Statement of Matter Involved" and "Jurisdiction" for discussion of these two points.

III.

Specifications of Error.

The Supreme Court of Minnesota erred:

1. In affirming the Order and Decree of the District Court of Hennepin County, Minnesota.
2. In holding that income-producing real estate owned by respondent is exempt from taxation because of the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854.
3. In holding that the territorial legislature had power to grant an irrevocable exemption in perpetuity.
4. In holding that the grant of exemption constituted a contract binding on the State of Minnesota.

5. In refusing to hold that the grant of exemption was null and void under the Constitution and Laws of the United States particularly:

- (a) Act of Congress of March 3, 1849 (Organic Act of Minnesota).
- (b) Act of Congress of May 11, 1858 (Act admitting State of Minnesota to the Union).
- (c) Article 1, Secs. 8 and 9 of the Constitution of the United States.
- (d) Fifth Amendment to the Constitution of the United States.
- (e) Tenth Amendment to the Constitution of the United States.

6. In refusing to hold that the grant of exemption was a revocable privilege, and as such, was revoked both by the Act of Admission and the adoption of the State Constitution.

7. In holding that respondent, as a matter of law, did not forfeit or abandon its right to exemption by suspension of its teaching functions.

IV.

Argument.

A. Summary of State Supreme Court's Opinion.

The Supreme Court of Minnesota, in holding respondent's property was exempt from taxation, felt constrained to follow and adhere to the decision in the early case of *County of Nobles v. Hamline University*, 46 Minn. 316, 48 N. W. 1119, which it apparently deemed to be supported by *Home of the Friendless v. Rouse*, *supra*, and *Washington University v. Rouse*, *supra*. In *County of Nobles v. Hamline University*, *supra*, the Court held that the territorial legislature

of Minnesota had power to grant and did grant to the Trustees of the Hamline University by the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854, an irrevocable exemption binding on the present state. The Court's sole authority for its holding was *First Div. etc. R. Co. v. Parcher*, 14 Minn. 297 (Gil. 224).

First Div. etc. R. Co. v. Parcher, *supra*, involved a territorial charter provision for a 3% gross earnings tax "in lieu of all taxes and assessments whatever." Disregarding this provision the State attempted to tax certain lands of the company on an ad valorem basis. These lands had been given to the railroad by the State which had received them from the United States under an Act of Congress to aid the construction of certain railroads. The court held the 3% gross earnings tax provision of the railroad charter to be an irrevocable contract covering taxation of both the land grant lands and operating properties of the company.

Subsequently, the exemption of these so-called land grant lands until sold was sustained on the grounds that it was an agreement made in execution of a trust imposed on the State by the United States. *Stearns v. Minnesota*, 179 U. S. 223, 21 S. Ct. 73, 45 L. E. 162, reversing *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210. However, an increase in the gross earnings tax on the operating property of the railroad to 4% was sustained, and that portion of the opinion of the Court in the *Parcher* case which related to contract right under its charter was rejected as obiter dictum. *Great Northern Railway Company v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446, affirming 106 Minn. 303, 119 N. W. 202. In *Trustees of Pillsbury Academy v. State*, 204 Minn. 365, 283 N. W. 727, aff'd per curiam, 308 U. S. 506, 60 S. Ct. 92, 84 L. E. 433, the Court said that "by the decision in the *Great Northern* case (106 Minn. 303, 119 N. W. 202), *First Division St. Paul and Pacific R. Co. v. Parcher*, 14

Minn. 297 (Gil. 224), and quite a catalog of similar cases following it, were in part distinguished and impliedly at least disapproved."

Every statement of law in the *Parcher* case except that relating to the trust involved in the handling of land grant lands by the territory for the United States was fully discredited and rejected. *Great Northern Railway Company v. Minnesota, supra*; *Stearns v. Minnesota, supra*; *Trustees of Pillsbury Academy v. State, supra*.

In the instant case, however, the Supreme Court of Minnesota apparently revives and approves the contract holding of the *Parcher* case on which the decision in *County of Nobles v. Hamline University, supra*, was predicated, saying of the *Parcher* case: "we are favorably impressed with it."

A Schedule to the Minnesota Constitution of 1857 contained two provisions. The first declared:

(1) " * * * that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; * * *"

The second provided:

(2) "All laws now in force in the territory of Minnesota not repugnant to this constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature."

The Minnesota Supreme Court clearly indicated that it was only as a contract right such as would be protected by the United States Constitution that the grant of exemption was affected by the first provision of the Schedule. It said:

"The adoption of the state constitution, upon which reliance is placed for the present claim of right to tax Hamline's property, could not change its granted rights if these were contractual obligations."

and, further,

“In addition, the people of the state, in adopting their constitution, recognized and assumed the validity of all existing contract obligations and rights created thereby.”

In *First Div. etc. R. Co. v. Parcher, supra*, the Court, after holding that the charter grant was a contract protected by the United States Constitution, referred to Sec. 1 of the Schedule to the State Constitution as “perhaps unnecessary,” which no doubt it was, in view of the protection afforded by Article 1, Sec. 10 of the Federal constitution.

The Supreme Court, in addition to stressing *Home of the Friendless v. Rouse, supra*, and *Washington University v. Rouse, supra*, placed great reliance on the case of *Board of Trustees for Vincennes University v. State of Indiana*, 55 U. S. (14 How.) 268, 14 L. E. 416, which seems to be wholly inapplicable to this situation. In that case, there being a direct grant by Congress of certain lands for the use of a seminary, the only question was whether title to a particular tract of property had vested in the university. The case of *Perry v. United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. E. 12, cited by the Court, is inapplicable because no question concerning the surrender of sovereignty was there involved.

Res Judicata Not Considered by State Supreme Court.

The Supreme Court of Minnesota in adhering to its decision in the early *Hamline University* case did not invoke the doctrine of res judicata as did the Court of first instance in addition to its holding on the contract phase of the charter grant. The only reference thereto in the opinion is the Court's statement that “in this case Hamline has urged as an additional reason for affirmance the doctrine of *res judicata* of what was there (*County of Nobles v. Hamline University*) determined.” It is clear from the discussion of

the early *Hamline University* case, as well as other cases relating to the powers vested in the territorial legislature, that the Supreme Court based its decision solely on the merits of the questions presented for consideration.

The Supreme Court of Minnesota has evinced a desire to have the Federal questions here presented finally decided on the merits by this Court. *Trustees of Pillsbury Academy v. State, supra*.

This Court will not assume that the State Supreme Court invoked the doctrine of *res judicata* so as possibly to limit its right to review in the absence of a direct holding. See concurring opinion of Chief Justice Hughes in *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, 84 L. E. 537.

B. Lack of Power to Grant Irrevocable Exemption.

Territories Not "Sovereign"

Territorial statutes depend for authority on the Acts of Congress and must conform thereto and to the Constitution of the United States. *Corpus Juris*, Vol. 59, "Statutes," Sec. 12, page 523; *Domenech v. National City Bank*, 294 U. S. 199, 55 S. Ct. 366, 79 L. E. 857.

A clear distinction exists between the powers of territorial and state governments. *Corpus Juris*, Vol. 62, "Territories," Secs. 8 and 9, pp. 788-790 incl.

In *Domenech v. National City Bank, supra*, this Court stated (p. 204): "Puerto Rico, an island possession, like a territory, is an agency of the Federal government, having no independent sovereignty, comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States."

Discriminatory Taxation by an Agency of Congress is Prohibited by the United States Constitution and Organic Act of the Territory.

The exemption granted to the respondent in its charter applies to all its property, regardless of the use made of it, and in perpetuity. The exemption was patently arbitrary and discriminatory, and one not based on any classification of property for taxation purposes. As stated by this Court in *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 L. E. 225: "It is the contract of exemption which, in the very nature of things, characterizes the grant as a special privilege."

Article 1, Secs. 8 and 9 of the United States Constitution required a measure of equality and uniformity of taxation by the Congress and the territorial legislature. *Loughborough v. Blake*, 18 U. S. (5 Wheat.) 317, 5 L. E. 98; *Gibbons v. District of Columbia*, 116 U. S. 404, 6 S. Ct. 427, 29 L. E. 680; *Peacock v. Pratt*, 121 Fed. 772.

The inhibition of the Fifth Amendment to the Constitution applies to the Federal government and agencies set up by Congress for the government of the territory. *Farrington v. Tokushige*, 273 U. S. 284, 47 S. Ct. 406, 71 L. E. 646. It is well established that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment. *Heiner v. Donnan*, 285 U. S. 312, 326, 52 S. Ct. 358, 361, 76 L. E. 772.

Sec. 6 of the Organic Act prohibited discriminatory taxation. *McComb v. Bell*, 2 Minn. 295 (Gil. 256). The parties hereto stipulated that "there was a substantial amount of property in the territory of Minnesota subject to taxation under the general laws of the territory and then owned by residents and non-residents of the territory" (R. 94).

The portion of the opinion in the *Parcher* case holding that the railroad charter tax provision was not void as discriminatory under the Organic Act of the territory, has been reconciled by this Court on the basis that it was presumed that the commuted taxes paid by the railroad were a fair equivalent of the taxes which would have been paid on an ad valorem basis as in *McHenry v. Alford*, 168 U. S. 651, 18 S. Ct. 242, 42 L. E. 614; *Stearns v. Minnesota*, *supra*.

C. Exemption Does Not Constitute a Contract Binding on State.

It is very clear that there is nothing in the United States Constitution which contemplates or authorizes any direct abridgment by national legislation of the power of states to tax. *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71, 19 L. E. 101; *Texas v. White*, 74 U. S. (7 Wall.) 700, 19 L. E. 227.

A territorial statute, even though it contains all the elements of a contract is subject to the plenary power of Congress and may be repealed by an Act of Congress. *Mormon Church v. United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. E. 478; *Welch v. Cook*, 97 U. S. (VII Otto) 541, 24 L. E. 1112.

The Organic Act of Minnesota, Sec. 6, provided "all the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect." The absence of any act by Congress is not to be construed as a recognition of the power of the legislature to pass laws in conflict with the Act of Congress under which it was created. *Clayton v. Utah Territory*, 132 U. S. 632, 10 S. Ct. 190, 33 L. E. 455.

However, even if Congress had approved or enacted the legislation it would be subject to the same legal objections. *Welch v. Cook*, *supra*.

Exemption is a "Revocable Privilege" and Not a "Contract Right" Protected by Article 1, Sec. 10 of the United States Constitution.

Where there exists in the legislative power the right to amend or modify the grant of exemption, it is merely a "revocable privilege" and not a "contract right." *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 19 S. Ct. 530, 43 L. E. 840; *Seton Hall v. So. Orange*, 242 U. S. 100, 37 S. Ct. 54, 61 L. E. 170; *Troy Union R. R. Co. v. Mealy*, 254 U. S. 47, 41 S. Ct. 17, 65 L. E. 123.

In *Trustees of Dartmouth College v. Woodward*, 17 U. S. (4. Wheat.) 518, 4 L. E. 627, Justice Story in his concurring opinion clearly stated in three different places that had the right to amend the charter been reserved to the legislature, the principles of the decision would not apply.

Properly Construed as a Revocable Privilege, the Purported Exemption Repealed by State Constitution and Statutes.

The exemption grant was repugnant to the constitution of the State of Minnesota. *State v. Chicago Great Western Railway Co.*, 106 Minn. 290, 119 N. W. 211; *State v. Great Northern Railway Company*, 106 Minn. 303, 119 N. W. 202; *Great Northern Railway Company v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446.

The right of modification and repeal being inherent in Congress existed in the instant case until the first moment of existence of the State of Minnesota. Full right to enact its own laws was given by Congress to the new State as an incident of transferred sovereignty. This included the right to supersede the territorial enactments. This the state did, by the adoption of its constitution. There being no irrevocable contract, no right of the respondent was violated by the adoption of the constitutional prohibition. *Welch v. Cook*, *supra*.

As a Revocable Privilege, the Purported Exemption was Repealed by Act of Congress of May 11, 1858 (Act of Admission).

The Congressional Act of May 11, 1858 declared that the State of Minnesota be "admitted into the Union on an equal footing with the original states in all respects whatever."

The power given to Congress by Article 4, Sec. 3 of the Federal constitution is to admit new states which are equal in power, dignity and competency to assert the residuum of sovereignty not delegated to the Federal government. *Coyle v. Oklahoma*, 221 U. S. 559, 567, 31 S. Ct. 688, 55 L. E. 853. The right of every new state to exercise all the powers of government which belong to or may be exercised by the original states of the Union must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands. *Sands v. Manistee River Improvement Company*, 123 U. S. 288, 8 S. Ct. 113, 31 L. E. 149 and cases cited therein.

The rule of law established in *Sands v. Manistee River Improvement Company*, *supra*, is equally applicable here. The power of taxation is inherent in sovereignty and is an incident of sovereignty. The State of Minnesota on her admission had the right, as an attribute of sovereignty, to exercise this "basic power of government" without any limitation thereon.

D. If Exemption Constitutes Contract Binding on State, Respondent Forfeited "Special Privilege" of Immunity from Taxation by Non-compliance With Charter.

The parties hereto stipulated that the teaching functions of the University were suspended from March, 1869 to September, 1880 inclusive (R. 68, 69).

The petitioner does not claim, as indicated by the decision of the Supreme Court of Minnesota, that respondent's char-

ter has been lost by abandonment or otherwise. Exemption from taxation is not a right, privilege, or immunity which is included within a corporation's franchises. *State v. Great Northern Railway Company*, 106 Minn. 303, 119 N. W. 202; *Great Northern Railway Company v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. E. 860. The grant of exemption is not one of respondent's "charter rights." It is petitioner's contention that respondent's failure to maintain and conduct an institution of learning as required by its charter constituted, as a matter of law, the forfeiture of its "special privilege" of exemption from taxation without requiring the State of Minnesota to bring a quo warranto action to forfeit the charter. *State v. Chicago Great Western Railway Co.*, 106 Minn. 290, 119 N. W. 211; *Trustees of Pillsbury Academy v. State*, *supra*.

Conclusion.

The exemption provision in respondent's charter applies to all its real and personal property regardless of the use made of it. The exemption granted to respondent was not in accord with the general tax laws of the territory enacted in 1851 which subjected all property, except certain classes of property expressly exempted, to taxation on an ad valorem basis. Property owned by a University solely for revenue purposes was not included within the exempt classes of property. The same is true under the State's present constitutional and statutory provisions.

We are endeavoring to bring about a situation in which the respondent will be treated the same as other universities and colleges located in the State of Minnesota. The loss of revenue to the State of Minnesota by reason of this unlimited exemption is now considerable and may become very serious if this exemption grant in perpetuity is sustained. The respondent should bear its proper and equal

burden of taxation along with other taxpayers who own income-producing property. It is not fair to the taxpayers of Minnesota that respondent should be favored by immunity from taxation as to its income-producing property.

We desire to reiterate once more that this Court has never passed on the basic question presented herein relating to the power of the territorial legislature to grant an irrevocable exemption in perpetuity binding on the state. On the basis of the fundamental distinctions between a "territory" and a "state," it may not be necessary to re-examine the decisions in the early *Rouse* cases. We do believe, however, that the rule established in those cases, permitting a state to bargain away its taxing power, is erroneous and should be overruled; at least, it should not be extended to permit the Territory to bargain away the taxing power of a future state.

We submit that the Petition for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota, involving fundamental Federal constitutional questions, should be granted by this Court.

Respectfully submitted,

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SEP 11 1944

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1944

No. 358

STATE OF MINNESOTA,

Petitioner,

vs.

TRUSTEES OF THE HAMLINE UNIVERSITY OF MINNESOTA, A CORPORATION.

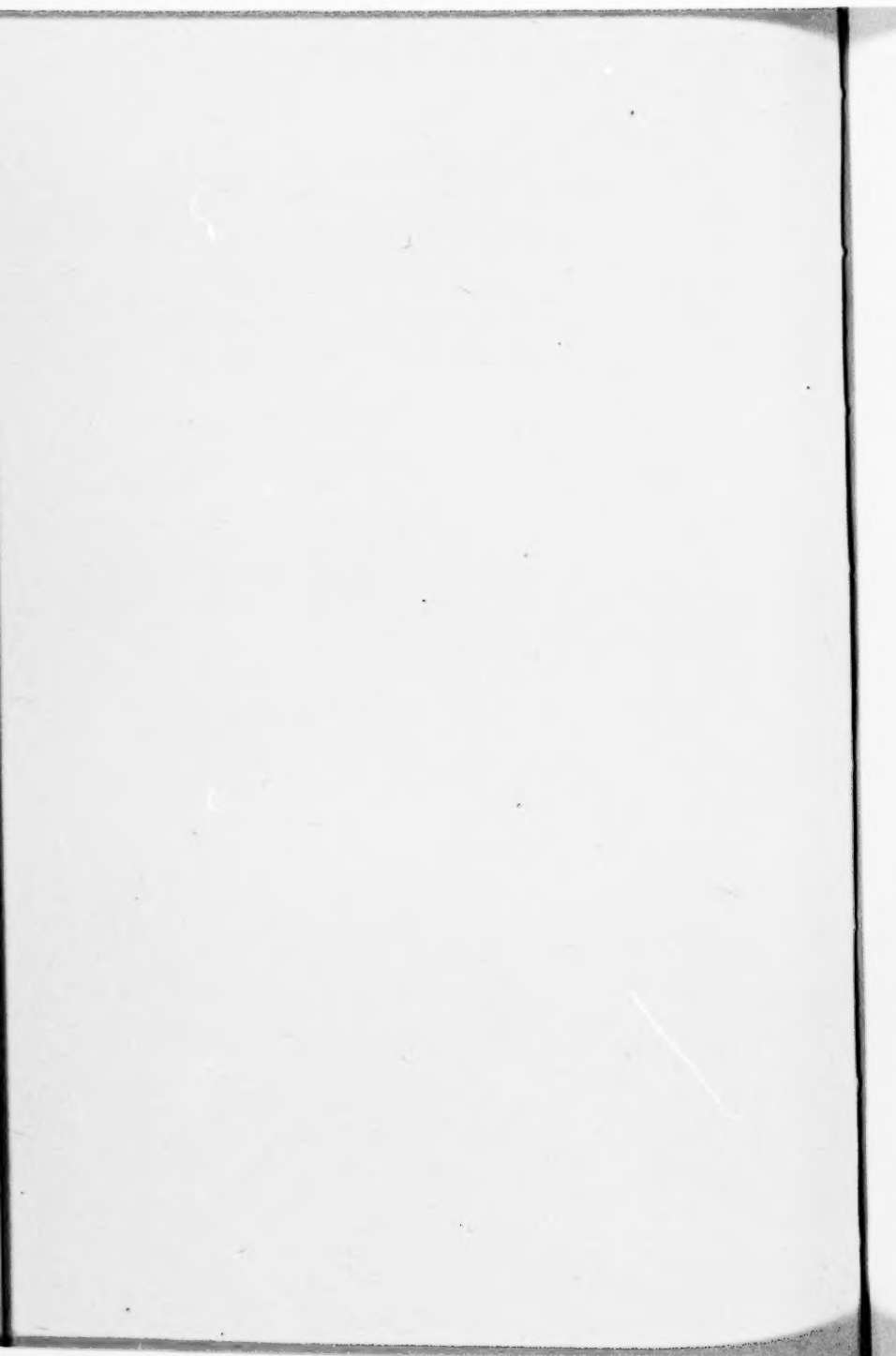
ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

**BRIEF FOR TRUSTEES OF THE HAMLINE UNIVERSITY
OF MINNESOTA IN OPPOSITION**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1944

No. 358

STATE OF MINNESOTA,

Petitioner,

vs.

TRUSTEES OF THE HAMLINE UNIVERSITY OF MINNESOTA, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

**BRIEF FOR TRUSTEES OF THE HAMLINE UNIVERSITY
OF MINNESOTA IN OPPOSITION**

THE FACTS

Chapter 43 of the Laws of the Territorial Assembly of Minnesota for 1854 granted to "Trustees of the Hamline University of Minnesota" (hereinafter for convenience called the respondent) a charter to conduct an educational institution (R. 99-105). Section 11 provided that "all corporate property belonging to the institution, both real and personal is, and shall be free from taxation". The charter was accepted by respondent (R. 154) and a preparatory depart-

ment was opened on November 16, 1854, and the college proper in 1857 (R. 26, 27). Until 1869 this was the only institution of college rank in Minnesota (R. 57). By 1867 it had sent out upwards of 200 teachers to the common schools (R. 43). The school was beset with financial difficulties throughout, and in 1869 the trustees, pursuant to the provision of the charter (section 4) that they shall at no time "be required to exceed the means under their control", suspended the teaching functions (R. 58-60). During these and following years respondent suffered from the consequences of the depression following the Civil War, financial panics, grasshopper and other insect plagues, low prices for agricultural products, and general hard times; but it continuously and persistently solicited pledges and raised funds, obtained legislation to permit change of location, acquired lands and erected buildings, all of which resulted in the resumption of the teaching functions in a new location with substantial and adequate buildings, equipment and staff, in 1880 (R. 69-84, 156-158, 268-269). It has ever since conducted a university of recognized rank. It has approximately 600 students, 90% of whom are residents of Minnesota (R. 158). The cost of educating them in tax-supported institutions would have been far more than the value of the tax exemption (R. 94, 159), and respondent's services to the state "greatly exceed the amount of taxes now or which are likely to be involved in the foreseeable future" (R. 269). Respondent has at all times complied with the terms of its charter and at no time did it abandon its object or its property (R. 154-158, 273-274).

PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Organic Act of the Territory of Minnesota, enacted on March 3, 1849, provided (section 6) "that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act * * *".

Respondent's charter was granted by the Territorial Assembly on March 3, 1854 (Laws of 1854, Chap. 43; R. 99-105). It provided:

"* * * all corporate property belonging to the institution, both real and personal is, and shall be free from taxation" (section 11).

On October 13, 1857, the people of the Territory, pursuant to the Act of Congress of February 26, 1857, authorizing a state government, adopted the Constitution of the State of Minnesota (*Minn. Stats. 1941*, pp. 24-54). Section 1 of the Schedule, which is a part of the Constitution (*Minn. Stats. 1941*, p. 51) provides:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights * * * and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place * * *."

Article 1, section 11 of the Constitution of Minnesota provides:

"No * * * law impairing the obligation of contracts shall ever be passed * * *" (*Minn. Stats. 1941*, p. 25.)

Article 1, section 10 of the Constitution of the United States provides:

"No state shall * * * pass any * * * law impairing the obligation of contract * * *"

THIS COURT IS WITHOUT JURISDICTION TO REVIEW

The Statute of a Territory Is Not a "Statute of the United States" or a "Statute of Any State."

Section 237 (b) of the Judicial Code authorizes review by certiorari of the judgment of a state court where is drawn in question "the validity of a * * * statute of the United States", or where is drawn in question "the validity of a statute of any State" on the ground of its being repugnant to the Constitution or laws of the United States.

The charter creating the contract of tax exemption was granted initially by the Territory of Minnesota. If the contract rests on the original grant there would be drawn in question the validity of a statute of the Territory. The review authorized by the Judicial Code is limited to cases involving the validity of statutes of the United States or of the states. It does not include the statute of a territory, whether it be held valid or invalid. *Scott vs. Jones*, 5 How. 343; *Miners' Bank vs. Iowa*, 12 How. 1; *Messenger vs. Mason*, 10 Wall. 507.

The power of Congress to disapprove the territorial act did not make the charter an Act of Congress rather than that of the territorial government. A territorial statute enacted under authority of Congress previously granted is to be treated as emanating from its immediate source and not as an Act of Congress. *Miners' Bank vs. Iowa*, *supra* (pp. 7-8); *Honolulu Rapid Transit & Land Co. vs. Wilder*, 211 U. S. 137, 142.

The only question that might arise under the Organic Act, under the authority of which the territory acted, would be one of interpretation, not of the validity, of that act, and therefore not one subject to review by this court.

The case of *Christianson vs. King County*, 239 U. S. 356, cited by petitioner, did not arise under section 237 (b) of

the Judicial Code relating to review by this court, but under sections 128 and 241, relating to the finality of judgments of circuit courts of appeal and review of decisions of those courts by the Supreme Court. The only limitation imposed by section 241 upon the review of judgments of circuit courts of appeal that are not made final by the Judicial Code is that the matter in controversy shall exceed one thousand dollars. It was therefore competent for this court to review a decision of a circuit court of appeals in a case involving the *construction* of a statute of the United States, whereas by section 237 (b) jurisdiction to review is limited to cases involving the *validity* of statutes of the states and of the United States.

The case of *Welch vs. Cook*, 7 Otto 541, has no application.

The State Court Sustained the Charter Exemption on an Adequate Non-federal Ground.

Respondent's reply in the trial court alleged that the imposition of the tax would violate the contract clause of article 1, section 10 of the Constitution of the United States, and would also violate article 1, section 11 of the Constitution of Minnesota, which provides that "no * * * law impairing the obligation of contracts shall ever be passed" (R. 21; *Minn. Stats. 1941*, p. 25).

The trial court found that the charter was a contract within the cited provisions of both Constitutions, and that the obligations thereof would be impaired if the tax were imposed (R. 153-154). Its conclusions of law were to the same effect (R. 166). The decree adjudges that the charter constitutes a contract the obligations of which are protected against impairment by the cited provisions of both Constitutions (R. 169). The findings and conclusions were assigned as error by petitioner on appeal to the Supreme Court of Minnesota (R. 260-261, 257-258). That court, without

specifically indicating whether its decision was based on one Constitution or on the other, affirmed the judgment without qualification (R. 278).

The opinion makes no mention of either article 1, section 10 of the Constitution of the United States, or article 1, section 11 of the Constitution of Minnesota.¹ Only four decisions of this court are cited in the opinion. One is *Board of Trustees for the Vincennes University vs. Indiana*, 14 How. 269 (R. 277), cited to the proposition that a territorial legislature has power to grant an act of incorporation and that the corporate powers were not affected and could not be affected by the Constitution of the state, which provided, as does the Constitution of Minnesota, for the continuance of all contracts. Another is *Perry vs. United States*, 294 U. S. 330 (R. 274), cited to the proposition that the adoption of the state Constitution could not change granted rights if these were contractual obligations. The others are *Home of the Friendless vs. Rouse*, 8 Wall. 430, and *Washington University vs. Rouse*, 8 Wall. 439 (R. 271-272), cited in subdivision 1 of the opinion which dealt solely with necessity of consideration to sustain a contract. The opinion states that these cases hold that grants of tax immunity of the type here involved are protected by the federal Constitution, and directly thereafter it quotes an excerpt from the former case dealing with consideration alone. By its passing reference to these cases in pointing out that consideration for the contract was present, the state court did nothing more than say that the consideration was present in this case as it was in those.

The court followed in all respects its earlier decision in *County of Nobles vs. Hamline University*, 46 Minn. 316,

¹In this respect the decision is like one in which no opinion is written and resort is had to the decision of the trial court to determine whether an exclusive federal question was presented. See *Wood Mowing & R. M. Co. vs. Skinner*, 139 U. S. 293; *Southwestern Bell Tel. Co. vs. Oklahoma*, 303 U. S. 206.

which presented the same questions as those presented in the case at bar (R. 275-277). The Constitution of the United States is not referred to in the pleadings, the record or the judgment in the Nobles County case (R. 173-195) and no mention of it is made in the opinion, which holds "that the territorial legislature had the power to grant this exemption, and bind the future state" (p. 316).

In the County of Nobles case the state court followed its decision in *First Division St. P. & P. R. Co. vs. Parcher*, 14 Minn. 297. The opinion in the Parcher case makes no mention of the Constitution of the United States. In answer to the contention that even if the territorial legislature could bind the territory it had no power to alienate or abridge the sovereign authority of the future state, the court said that *Dartmouth College vs. Woodward*, 4 Wheat. 651, *would* be a sufficient answer, "But section 1 [the contract adoption provision] of the schedule of our constitution sets this matter at rest * * *." It then quotes the section and says, "This provision was perhaps unnecessary, *but it is at any rate decisive*" (p. 327). (Italics supplied.) Neither of these cases refer to any one of the several decisions of this court in which the federal Constitution was invoked to protect a contract of tax exemption.

If the state court did not rest its decision on the contract clause of the Constitution of the United States alone, the ground on which the decision otherwise rests is not important so long as it is not a federal one. While the contract impairment clause of the state Constitution is not mentioned in the opinion, its inclusion in the findings, conclusions and judgment of the trial court, affirmed by the state court, indicates that the decision was rested on that provision.

It is, as indicated by headnote 3² of the opinion (R. 266),

²"A valid legislative grant amounting to a contract may not be impaired by subsequent legislation."

also rested on the general proposition of law that the parties to a valid contract are bound by its terms, as held in *Perry vs. United States*, *supra*, cited in the subdivision of the opinion supporting headnote 3 (R. 274), especially where the people by their Constitution have adopted the contract and assumed its performance. In *Perry vs. United States*, *supra*, this court held binding a governmental contract without resort to constitutional protections.

Furthermore, the state court, following its earlier decisions, relied upon and stressed (R. 270-271, 277, 278) the contract adoption provision (Schedule, section 1) in the state Constitution as one which in and of itself prohibited executive and legislative action in violation of its terms, as did also the trial court (R. 153).

From the record and from the state court's opinion it is plain that the decision rests on one or more of three grounds, viz.: the impairment of contract clause of the state Constitution, the inviolability of a contract under general law, and the contract adoption provision of the state Constitution; and if it may fairly be said that it rests on any one of them this court is without jurisdiction.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. * * *

Lynch vs. New York, 293 U. S. 52, 54-55, citing numerous cases.

Rule 20 of the Supreme Court of Minnesota (212 Minn., p. XLVI) permits an application for rehearing within ten days after the filing of the decision. Petitioner's failure to avail itself of this means of having the state court specify the basis of its determination warrants denial of the petition. See *Lynch vs. New York, supra* (p. 55).

NO REASON FOR ALLOWING THE WRIT IS PRESENTED

The case presents no element which under the rules of this court, or upon any other consideration, warrants review, if the court should determine that it has jurisdiction.

1. Basically, a writ to review is granted only when the state court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court" (Rule 38, 5 (a)).

Assuming that a federal question is presented, that question has been decided by this court many times. The decision of the state court conforms to all of the decisions of this court, from *New Jersey vs. Wilson*, 7 Cranch 164, decided in 1812, to now.

2. If it be thought that the court should, as suggested in the petition and supporting brief, decide whether a contract of tax exemption for a continuing consideration by any government in the American system would constitute an impairment of sovereignty, attention is directed to repeated decisions of that question by this court and discussions of it in both majority and minority opinions.

Piqua Branch of State Bank of Ohio vs. Knoop, 16 How. 369.

Jefferson Branch Bank vs. Skelly, 1 Black 436.

The Home of the Friendless vs. Rouse, 8 Wall. 430.

The Washington University vs. Rouse, 8 Wall. 439.

The Wilmington & Weldon Railroad Co. vs. Reid, 13 Wall. 264.

The East Saginaw Salt Mfg. Co. vs. City of East Saginaw, 13 Wall. 373.

Humphrey vs. Pegues, 16 Wall. 244.

Furthermore, at least where the contract is affirmed by the state Constitution itself, the question is one of state sovereignty and beyond federal control or restriction so long as the state maintains a republican form of government, and that is a political, not a judicial, inquiry. *Highland Farms Dairy vs. Agnew*, 300 U. S. 608, 612.

3. The history of respondent's charter itself presents cogent reasons for refusing the writ. The charter was granted in 1854 (Laws 1854, Chap. 43). More than fifty years ago the Supreme Court of Minnesota sustained the tax exemption provision of the charter against the same objections as those made now. *County of Nobles vs. Hamline University, supra*. More than 25 years ago the same court sustained the exemption against the claim that a limitation in the charter had been transgressed. *State vs. W. L. Harris Realty Company*, 148 Minn. 20. In 1930 the exemption was sustained by a default judgment of the District Court of Ramsey County in a proceeding for registration of title in which the state was a party defendant (R. 215-219). In 1940 it was again sustained by a judgment entered, on default by the state and on stipulation by the county, by the District Court of Redwood County in a like proceeding (R. 220-230). Between 1929 and 1938 the validity of the exemption was admitted and sustained by judgments or orders for judgment upon stipulation in the District Court of Ramsey County in ten separate proceedings instituted for the enforcement of

taxes sought to be levied on respondent's real estate (R. 160-166, 169, 206-214).

Aside from these fruitless, and by the Ramsey County authorities frivolous, attacks upon the charter, the validity of the exemption has uniformly been recognized by the taxing authorities (R. 160) and upheld by numerous opinions promulgated by the Attorney General of Minnesota (R. 234-242). The present decision of the Supreme Court of Minnesota should stand and respondent be freed of further litigation.

4. The language of the opinion in this case clearly shows that the state has been more than repaid for the exemption from taxation (R. 269, 271-272; see also R. 94, 159). There is nothing in the record to substantiate the claim that the grant was improvident.

5. Contractual exemptions from taxation like that contained in respondent's charter are held by many educational and charitable institutions and others. Some are evidenced by the reports of this court and of state courts. Some are even older than is respondent's. All have been relied upon for long periods of time. Reopening at this late date the question of their validity, which has been settled by decisions of this court running back more than a hundred years, would be of deepest concern to these institutions. It should be deferred until such time as this court may be compelled to do so on appeal from a decision striking down an exemption (e. g., *Trustees of Pillsbury Academy vs. Minnesota*, 204 Minn. 365, 308 U. S. 506), or at least until there is presented a petition for a writ which shows indubitably that the decision of the state court rests on a federal ground.

ARGUMENT

The argument will in the main follow the order of petitioner's brief.

Summary of State Court's Opinion.

Petitioner's argument under this head calls for brief comment.

The state court followed *County of Nobles vs. Hamline University, supra*, and *State vs. W. L. Harris Realty Co., supra*, which were in turn based on *First Division St. P. & P. R. Co. vs. Parcher, supra*. The Parcher case involved the validity of a territorial charter which, in consideration of a commuted system of taxation, exempted from tax certain granted lands. The property of the corporation, including the franchises, was acquired by the state under mortgage foreclosure and thereafter transferred to First Division St. P. & P. R. Company. The court held, against the same objections as those presented here, that the territorial legislature had power to make the contract, that the exemption did not invade the protection afforded non-residents by the Organic Act, and that the contract was binding on the state, resting the latter ground on the contract adoption clause of the state Constitution.

State vs. Great Northern R. Co., 106 Minn. 303 (affirmed, 216 U. S. 206), cited by petitioner, arose under the same initial charter and involved the question whether the commuted tax provision exempting from taxation property other than the granted lands involved in the Parcher case survived acquisition by the state of the corporation's property and franchises under mortgage foreclosure subsequent to the adoption of the state Constitution which required that all property be taxed, their restoration to the corporation, their reacquisition by the state by forfeiture, their transfer by the

state to a new corporation, their acquisition by another corporation through mortgage foreclosure, and their transfer to still another corporation.

The court decided only that the charter provision, so far as the commuted tax feature was concerned, was personal to the corporation and not subject to transfer, and that the subsequent legislative acts passed no exemption to the new company because exemptions were then prohibited by the state Constitution. It said the right of a state through its legislature to limit by contract its power of taxation when not restricted by constitutional provisions is "too firmly established to admit of discussion at this time. * * * The question must be deemed for present purposes completely at rest" (p. 322). After pointing out that a fair construction of the language would seem to justify the conclusion that the tax exemption was not irrevocable, it said:

"We are, of course, not to be understood as intimating an opinion that a contract of the tenor and effect of the one claimed could not legally have been entered into by the territory * * *" (p. 324).

That decision leaves undisturbed the holding in the *Parcher* case which was followed in the *County of Nobles* case, and expressly approved in the state court's opinion in the case at bar.

Petitioner's brief (p. 13) says that the court's opinion in the case at bar "clearly indicated that it was only a contract right such as would be protected by the United States Constitution that the grant of exemption was affected by the first provision of the Schedule" and quotes the statement in the opinion that the state Constitution could not change respondent's granted rights "if these were contractual obligations". This statement is nothing more than that there was a *contract*. The court later points out (R. 277) that by the adoption of the Constitution the people recognized and as-

sumed the contract, and makes no mention of the contract clause of the Constitution of the United States.

Similarly, petitioner's brief (p. 14) states that in the *Parcher* case it was held that the charter was a contract "protected by the United States Constitution". As has already been pointed out, what was said in the *Parcher* case was that the doctrine of *Dartmouth College vs. Woodward*, *supra*, would be sufficient basis for holding that the territorial contract was binding on the succeeding state, *but* that the contract adoption clause of the state Constitution "sets the matter at rest" and "is decisive" (p. 327).

The Territory had Power to Contract for an Irrevocable Tax Exemption.

The legislative power granted the territory by the Organic Act (section 6) extended to "all rightful subjects of legislation". The legislative and contract authority of the territory is as broad as that of a state. *Clinton vs. Englebrecht*, 13 Wall. 434; *Maynard vs. Hill*, 125 U. S. 190; *Cope vs. Cope*, 137 U. S. 682; *W. C. Peacock & Co. vs. Pratt* (C. C. A. 9), 121 Fed. 772, 775; *Kitagawa vs. Shipman* (C. C. A. 9), 54 F. (2d) 313; *Yerian vs. Territory of Hawaii* (C. C. A. 9), 130 F. (2d) 786; *Bennett vs. Nichols*, 9 Ariz. 138; *Winona & St. P. & P. R. Co. vs. County of Deuel*, 3 Dak. 1; *First Division St. P. & P. R. Co. vs. Parcher*, *supra* (pp. 326-327).

A state may make a contract granting an irrevocable exemption from taxation. *Piqua Branch of State Bank of Ohio vs. Knoop*, *supra*; *Jefferson Branch Bank vs. Skelly*, *supra*; *The Home of the Friendless vs. Rouse*, *supra*; *The Washington University vs. Rouse*, *supra*; *East Saginaw Salt Manufacturing Co. vs. City of East Saginaw*, *supra*; *Humphrey vs. Pegues*, *supra*; *The Northwestern University vs. People*, 99 U. S. 309; *St. Anna's Asylum vs. City of New Orleans*, 105 U. S. 362.

A Legislative Grant of Exemption From Taxation Is Not an Impairment of a Sovereign Power.

For well over a century the established law in this country has been that a legislative grant of exemption from taxation based on a consideration is a valid contract.

Dissenting opinions in some cases argue that a sovereign power may not be impaired. The answer has been made that "it is of the essence of sovereignty to be able to make contracts and give consents upon the exertion of governmental power". *United States vs. Bekins*, 304 U. S. 27, 52 (citing among other cases *New Jersey vs. Wilson*, *supra*, and *Jefferson Branch Bank vs. Skelly*, *supra*,³ both of which involve contracts of tax exemption). And again the answer given to the argument that "the government cannot by contract restrict the exercise of a sovereign power" is that "the right to make binding obligations is a competence attaching to sovereignty". *Perry vs. United States*, *supra*, p. 353. See also 57 *Harvard Law Review* (May, 1944) 640, 653-654.

The argument of the dissents to the effect that taxation is like eminent domain and police power, which latter cannot be contracted away, is unsound. See *Stone vs. Mississippi*, 11 Otto 814, 820. Police power and eminent domain are direct governmental controls exercised over persons and property. These must be retained in kind to be effective. But taxation is only to raise revenue, and this can be accomplished in many different ways. Any one source of taxation is not vital. A dollar is a dollar from whatever source derived. Taxation is, like borrowing money, a matter of finance, and the power of the state to contract in this field is well recognized and is a matter of public necessity and

³These two cases were cited in *First Division St. P. & P. R. Co. vs. Parcher*, 14 Minn. 297, *supra*, in answer to the argument that the taxing power is a sovereign power which the legislature may not alienate or abridge.

convenience. A state may by contract borrow money and agree to pay it back, binding future legislatures; so a state may for a consideration agree not to take money in the future—not to tax the property out of the use of which the consideration flows. They are but different ways of securing the public service that is to be performed.

Nor is the other argument of the dissenting opinion valid—that the power to contract for tax exemption should not exist because it may be abused. Any legislative power may be abused, some even to jeopardize the existence of the state, such as the powers to borrow money, to appropriate and spend money, and to dispose of state property. But this does not mean that the powers do not exist. If control of them is necessary, limitations on them may be put in the constitutions. In the present case, far from any abuse of the tax exemption, there is evident noteworthy public service and a contract favorable to the state.

**The Grant of Tax Exemption Was Not Violative of Any
Restriction Upon the Powers of the Territory.**

The Organic Act (section 6) provides that the lands and other property of non-residents shall not be taxed higher than the lands and other property of residents. Assuming that the corporation is a resident within the meaning of this language (quaere, see *First Division St. P. & P. R. Co. vs. Parcher, supra*), the restriction prohibits discrimination only against the citizens of another state as such. *Logan vs. Young*, 191 Minn. 371. In any event, that question could be raised only by a non-resident affected.

In *Berryman vs. Whitman College*, 222 U. S. 334, cited by petitioner, the court assumed that a valid contract of exemption could be granted by a territory in the absence of express limitations, and held only that the Organic Act of Washington contained such a limitation.

The 5th Amendment has no application. Even the equal protection clause of the 14th Amendment does not prohibit exemptions from taxation. *Chicago vs. Sheldon*, 9 Wall. 50; *Mobile & Ohio R. Co. vs. Tennessee*, 153 U. S. 486; *New York ex rel. Metropolitan Street R. Co. vs. State Board of Tax Commissioners*, 199 U. S. 1. Scores, if not hundreds, of tax exemptions have been sustained by the courts and there appears to be no case where such exemption has been struck down on the ground that it denied equal protection of the law or that it took property without due process of law. Furthermore, only one who has been injured may raise the question.

No question under article 1, sections 8 and 9 of the Constitution of the United States was raised in the state court. Furthermore, the requirement of uniformity in section 8 applies only to duties, imports and excises; and the only provisions in section 9 relating to taxation are that direct taxes shall be laid in proportion to population and that taxes shall not be laid on exports from states.

The Territory Was Without Power to Revoke the Contract of Exemption.

Having exercised its authority with respect to a "rightful subject of legislation", i. e., the granting of the exemption, the territory was without authority to repudiate or revoke it. That is a rule of general law, applicable to governmental bodies as well as individuals. *Sinking Fund Cases*, 9 Otto 700, 718; *Lynch vs. United States*, 292 U. S. 571; *Perry vs. United States*, *supra*, pp. 351-353.

The Organic Act provided that legislation passed pursuant thereto "shall be submitted to the Congress * * * and, if disapproved, shall be null and of no effect". While Congress thus had power to disapprove, the territorial act nevertheless remained in full force and effect unless and until Con-

gress exercised that power. *Atchison, T. & S. F. R. Co. vs. Sowers*, 213 U. S. 55; *Denver & Rio Grande R. Co. vs. Wagner* (C. C. A. 8), 167 Fed. 75. Since there was no disapproval, respondent's charter was in full force and effect when the people of the territory changed their form of government and by their Constitution continued the contract.

The territorial statute is to be treated as emanating from its immediate source and not as an Act of Congress. *Miners' Bank vs. Iowa*, *supra*, pp. 7-8; *Honolulu Rapid Transit & Land Co. vs. Wilder*, *supra*, p. 142.

Respondent's contract was with the territory, not with Congress; and the termination of the life of the territory before the exercise by Congress of its power to disapprove left the charter and all of its provisions a valid and enforceable contract at the moment it was assumed by the state through the inclusion in the state Constitution of the Schedule continuing existing contracts.

The Contract of Exemption Is Binding on the State Both Under General Law and Under the State Constitution.

A change in the form of government does not extinguish its obligations or destroy existing rights. *The Board of Trustees for the Vincennes University vs. Indiana*, *supra*; *Dartmouth College vs. Woodward*, 4 Wheat. 518; *New Jersey vs. Wilson*, *supra*; *Barter vs. State of Wisconsin*, 9 Wis. 38; *Jewell Nursery Company vs. State*, 4 S. D. 213.

In addition, the Schedule of the state Constitution adopted by the people of the territory specifically continued existing contracts.

The Charter Exemption Was Not Repealed by the Act Admitting Minnesota to the Union.

It has never been thought that holding a state to a contract made by its predecessor government prevents its admission to the Union on an equal footing with the original states. If otherwise that were a discrimination, the short answer is that the original states likewise were bound by contracts made by predecessor governments: the King in *Dartmouth College vs. Woodward*, *supra*, and the Colony in *New Jersey vs. Wilson*, *supra*. And if that were not enough, the people of Minnesota in their Constitution voluntarily adopted and continued respondent's charter contract.

The Right to Exemption Has Not Been Lost By Non-compliance With the Charter.

Whether it be called a franchise, a right, or a privilege, a contract for exemption from taxation is an integral part of the corporate charter. The cases cited in petitioner's brief under this head (p. 20) hold no more than such a right cannot be *transferred* unless it inheres in particular property. The holding in *Morgan vs. Louisiana*, 3 Otto 217 (which cites with approval *Home of the Friendless vs. Rouse*, *supra*), falls short even of that. The ultimate decision is that "such immunity is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property". The exemption from taxation of the corporation's property continues at least as long as it is devoted to its own corporate purposes, in this case the maintenance of the University.

The claim of non-compliance is based on the fact that respondent's teaching functions were temporarily suspended. This was due to the depression following the Civil War, a nation-wide financial crisis, grasshopper and other insect

plagues, low prices for agricultural products, and general hard times, and was accompanied by constant and unremitting efforts to resume teaching. (See statement of facts, *supra*, pp. 1-2.) The trial court found that respondent has at all times complied with its charter (R. 154) and that at no time did it abandon its charter or object or property (R. 158). The Supreme Court of the state held that "the suspension was not a voluntary one; rather, it was caused by forces beyond the control of any human agency" (R. 273) and sustained a finding that there was "neither abandonment nor surrender of the grant" (R. 274).

The same issue was tried and disposed of in favor of respondent in the County of Nobles case in 1891 (R. 173-192).

Furthermore, under Minnesota law the state can avail itself of the claim of abandonment only through a quo warranto proceeding brought for that purpose (R. 274-275).

State vs. Minnesota Central R. Co., 36 Minn. 246, 258.

Richards vs. Minnesota Savings Bank, 75 Minn. 196.

Cf. State vs. W. L. Harris Realty Co., *supra*.

It is respectfully submitted that the petition should be denied.

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(9)

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CHARLES ELMORE GORDLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 359

STATE OF MINNESOTA,

Petitioner,

vs.

TRUSTEES OF HAMLINE UNIVERSITY OF MINNE-
SOTA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNE-
SOTA AND SUPPORTING BRIEF.**

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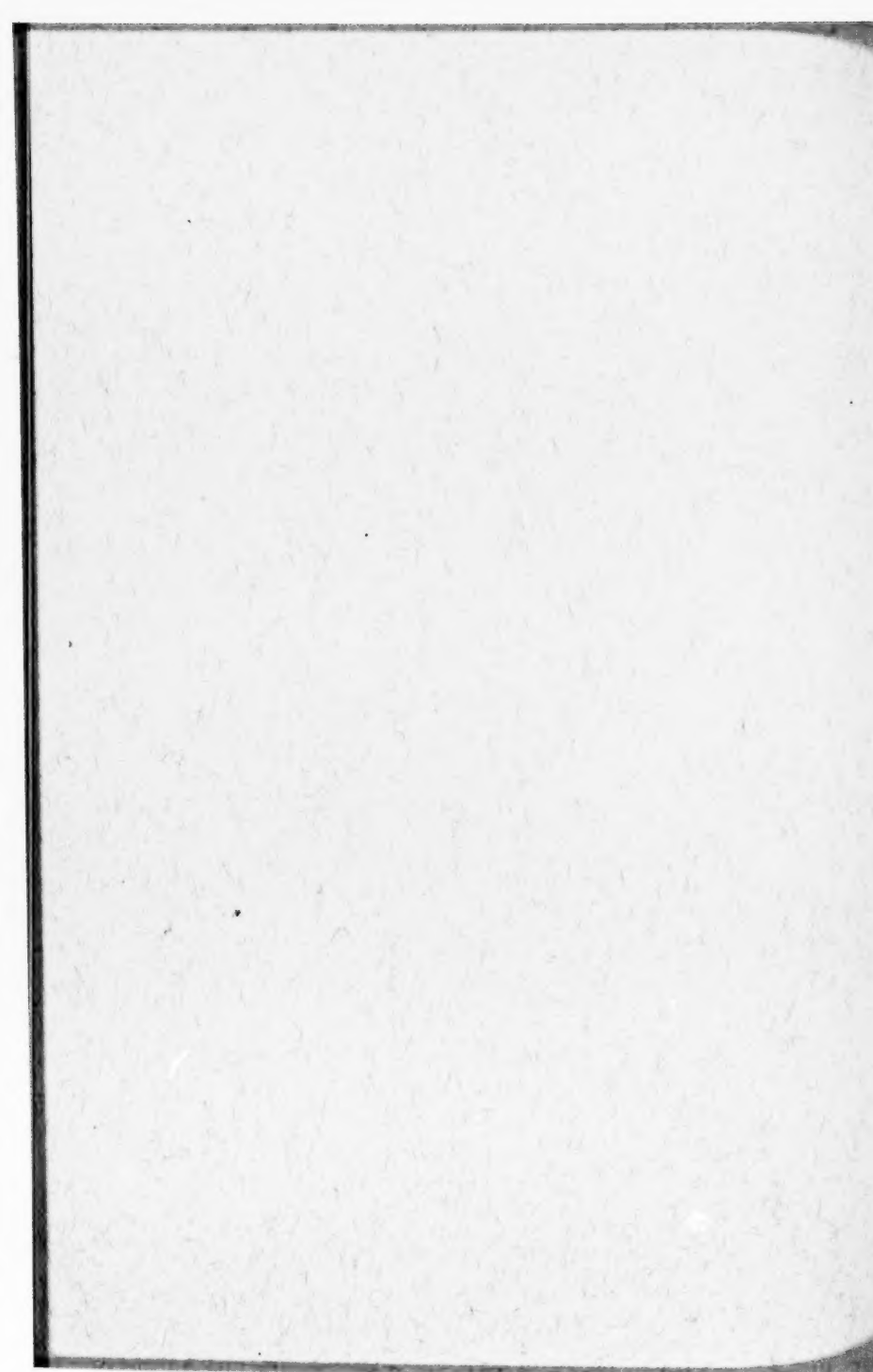
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 359

STATE OF MINNESOTA,

vs.

Petitioner,

**TRUSTEES OF HAMLINE UNIVERSITY OF MINNE-
SOTA,**

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNE-
SOTA.**

*To the Honorable The Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, the State of Minnesota, hereby petitions for review on writ of certiorari of the decision and judgment of the Supreme Court of Minnesota, being the court of last resort of that State, and respectfully shows:

Statement of the Matters Involved.

The State of Minnesota duly levied taxes for the years 1937, 1938 and 1939 upon the income-producing real estate in question owned by the respondent but which was not used by it for school purposes. The taxes being unpaid, were included in the delinquent tax lists (R. 144 to 152

inc.). The respondent filed answers for each year claiming the property to be exempt from taxation as provided in its Charter, Minnesota Territorial Laws 1854, Chapter 43, Section 11 which provides, among other things that "• • • all corporate property belonging to the institution, both real and personal is, and shall be free from taxation." (R. 1 to 25 inc.)

The court of first instance (District Court of Ramsey County, Minnesota) held that respondent's property is exempt from taxation under Chapter 43, Laws 1854; that said Charter constitutes a contract and is protected against impairment by the Federal Constitution (R. 208). Upon appeal to the State Supreme Court this judgment was affirmed. (R. 262.)

Jurisdiction.

Jurisdiction is conferred upon this court to review the decision and judgment of the Supreme Court of Minnesota by writ of certiorari under Sec. 237(b) of the Judicial Code (28 U. S. C. A. Sec. 344(b)).

The exemption, if valid, exists only by virtue of Chapter 43, Laws of the Territory of Minnesota for 1854. Income-producing property such as that here involved is not exempt under the constitution and statutes of the State of Minnesota. *State v. Carleton College*, 154 Minn. 280, 191 N. W. 400; *Trustees of Pillsbury Academy v. State*, 204 Minn. 365, 283 N. W. 727, aff'd per curiam, 308 U. S. 506, 60 S. Ct. 92, 84 L. E. 433. Such an exemption could not have been granted by the legislature of the State. *State v. Great Northern Railway Company*, 106 Minn. 302, 119 N. W. 202; *Great Northern Railway v. State of Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446.

The construction of an Act of Congress prescribing the authority of a territorial legislature, together with its enactments herein set forth, presents a proper and substan-

tial question for review. *Welch v. Cook*. 97 U. S. (VII Otto) 541, 24 L. E. 1112; *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114, 60 L. E. 327.

A federal right is involved in determining whether the act of the territorial legislature and its acceptance constitutes a contract protected by Article 1, Section 10 of the Constitution of the United States. Especially is this true where the validity of the territorial act is challenged on the ground that it violates the Constitution of the United States. The passage of Chapter 43, Laws of the Territory of Minnesota for 1854 was the exercise of an authority under a power derived from the United States. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 S. Ct. 1, 51 L. E. 78.

Also necessarily involved is the validity of certain constitutional and statutory provisions of the State of Minnesota as applied to the property of the respondent. The validity of these was challenged on the ground that if they were construed to subject respondent's income-producing property to taxation, the obligation of contract would be impaired. *Millsaps College v. City of Jackson*, 275 U. S. 129, 48 S. Ct. 94, 72 L. E. 196.

Your petitioner made and filed in the court of first instance a written Motion for Judgment on the pleadings on the ground that the exemption provision of Chapter 43 of the Laws of the Territory of Minnesota for 1854 was null and void under the constitution and statutes of the United States and the State of Minnesota (R. 29-32 incl.). The Motion for Judgment directly challenged the power of the territorial legislature to (1) grant an exemption in perpetuity of property based solely on ownership, (2) contract away the right of taxation, (3) make an irrevocable contract of exemption, (4) limit the right of the future state to tax, and (5) that such contract was terminated upon the

adoption of the State Constitution and was repugnant to Article 9 thereof.

The particular federal constitutional and statutory provisions involved are:

1. Article 1, Secs. 8 and 9 of the Constitution of the United States.
2. Fifth Amendment to the Constitution of the United States.
3. Tenth Amendment to the Constitution of the United States.
4. The Act of Congress of March 3, 1849 (Organic Act of Minnesota):

"Sec. 6. And be it further enacted, That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

5. Act of Congress of May 11, 1858 (Act of Admission):

"* * * That the state of Minnesota shall be one, and it is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

The particular constitutional and statutory provisions of the State of Minnesota involved are:

- (1) Article 9 of the State Constitution as adopted in 1857 and as amended in 1906, subjecting all property to taxation

on a uniform basis except certain classes expressly exempted. (R. 140-141.)

(2) Secs. 272.01 and 272.02 as amended, Minnesota Statutes 1941 (Secs. 1974 and 1975, Mason's 1927 Minnesota Statutes, as amended), subjecting all real and personal property to taxation except certain classes expressly exempted.

At the conclusion of the testimony, the State again moved for judgment upon the same grounds asserted in the first motion in addition to the contention that if a contract did result from the enactment of Chapter 43, it was terminated by failure to operate a school from 1869 to 1880 (R. 172-176 inc.) which motion was denied.

The same constitutional and statutory objections urged in the court of first instance were raised by assignments of error and argument on appeal to the State Supreme Court (245).

The decision of the lower court was affirmed by the Supreme Court of the State of Minnesota in an opinion filed May 19, 1944 and is reported in — Minn. —, 14 N. W. (2d) 773 (R. 249).

The judgment sought to be reviewed was entered in the Supreme Court of Minnesota on the 31st day of May, 1944. (R. 262).

The date of application for the writ may be taken as the date the petition is filed in the office of the Clerk of this Court.

Questions Presented.

First: Was it within the power of the territorial legislature under the provisions of the Constitution of the United States and the Act of Congress of March 3, 1849 (Organic Act of Minnesota) hereinbefore set forth to grant an irrevocable exemption in perpetuity based solely on ownership of property by the respondent?

Second: Did the grant of exemption constitute a contract binding on the State of Minnesota?

Third: Did the Act of Congress of May 11, 1858 admitting the State of Minnesota into the Union on an equal footing with the original states in all respects whatsoever operate to abrogate or repeal the charter grant of exemption?

Fourth: Is the State of Minnesota obliged to recognize the charter exemption as valid and binding upon it in spite of the requirements of the constitution of the state that all property, except that specifically exempted by it, shall be taxed?

Fifth: By its charter the corporation was organized for the purpose of "establishing, maintaining and conducting an institution of learning for the education of both sexes:". The record shows that the teaching functions of the institution were suspended from 1869 to 1880 inclusive (R. 79, f. 236). In this connection, the question is presented whether respondent forfeited its special privilege of immunity from taxation by failing to maintain and conduct an institution of learning during that period of time.

Reasons for Allowance of Writ.

1. This court has never directly passed on the federal question as to the power of a territorial legislature to grant an exemption similar to the one contained in respondent's charter, nor its effect on the taxing power of a future state. The question though was presented but not decided in *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 L. E. 225, wherein an act of territorial legislature of Washington granting a similar tax exemption to Whitman Seminary was construed by this court.

2. The Supreme Court of Minnesota in its opinion cited in support of its holding the decisions of this court in *Home of the Friendless v. Rouse*, 75 U. S. (8 Wall.) 430, 19 L. E.

495, and *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439, 19 L. E. 498. It is the petitioner's position that the doctrine of those cases is not applicable to territorial enactments, and, even as to the power of the states, the decisions are erroneous and should be overruled by this court. The doctrine has, from the beginning, met with vigorous dissent from a strong minority of this court and has been vigorously protested by some state courts. See dissenting opinions in *Washington University v. Rouse*, *supra*; *State Bank of Ohio v. Knoup*, 57 U. S. (16 How.) 369, 14 L. E. 977; *Trustees of Phillips Exeter Academy v. Exeter*, 90 N. H. 472, 11 Atl. (2d) 569, 33 Atl. (2d) 665; Cooley's Constitutional Limitations, 8th Ed., Vol. 1, Ch. IX, page 571 and cases cited; Page on Contracts, 2nd Ed., Vol. 6, Sec. 3668. Recently this court has indicated that the *Rouse* cases should be re-examined and re-considered. *Gorman, et al. v. Washington University*, 314 U. S. 604, 62 S. Ct. 301, 86 L. E. 486; 316 U. S. 98, 62 S. Ct. 962, 86 L. E. 1300.

3. It is made clear in all of the decided cases that the rule that a state legislature may bargain away forever its taxing power is not applicable where either the state constitution prohibits discrimination in matters of taxation or where the state constitution or statute reserves the right to modify, alter, amend or repeal.

As hereinafter discussed, the Organic Act of the Territory of Minnesota and the United States Constitution prohibited discrimination in tax legislation, and Congress reserved the right to modify, alter, amend or repeal the Laws of the Territory. Congress and the State were free to revoke this exemption by respectively enacting the Act of Admission and the State Constitution.

The reasons for prohibiting a state legislature from bargaining away forever the taxing power of the state are even more cogent and persuasive as applied to a territorial

legislature. The power of a state to tax is inherent and sovereign as distinguished from a territory whose power to tax is derivative. *Domenech v. National City Bank*, 294 U. S. 199, 55 S. Ct. 366, 79 L. E. 857.

The power to tax has been declared by this court to be "the most basic power of government." *Wisc. v. J. C. Penney*, 311 U. S. 435, 444, 61 S. Ct. 246, 249, 85 L. E. 267. It should be determined whether a territorial legislature, as an agency of Congress, can deprive a state from exercising this basic power.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court directed to the Supreme Court of the State of Minnesota, commanding that court to certify and to send to this court for its review and determination a full and complete transcript of the record and all proceedings in the above entitled matter.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 359

STATE OF MINNESOTA,

vs.

Petitioner,

TRUSTEES OF HAMLINE UNIVERSITY OF MINNE-
SOTA,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

Opinion of the Supreme Court.

The opinion of the Supreme Court of Minnesota is reported in 14 N. W. (2d) 773. It appears in the printed record, pages 249 to 261 inclusive.

II.

Statement of the Case.

The Act of Congress of March 3rd, 1849, being the Organic Act of Minnesota created Minnesota a territory and established a territorial government whose power "shall

extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act" and reserving in the Congress the right to *disapprove* any legislation enacted (R. 110-112). In 1851 the Territorial Legislature of Minnesota enacted into law a complete tax code for the taxation of real and personal property in Minnesota, which was in force and effect during 1854 (R. 124 to 137 inc.). The respondent was incorporated in 1854 by virtue of territorial laws of Minnesota 1854, Chapter 43, which, in Section 11 of said Act, provided among other things that "* * * all corporate property belonging to the institution, both real and personal is, and shall be free from taxation" (R. 118). At this time, prior thereto and thereafter, there was a substantial amount of property in the Territory of Minnesota subject to taxation under the general laws of the Territory and then owned by residents and non-residents of the Territory (R. 186). Pursuant to this law, a school was established, and classes were opened to students in the City of Red Wing on November 16, 1854 (R. 36), and remained open for this purpose until March, 1869 (R. 71). In 1857 by Act of Congress, the people of this Territory were authorized to form a Constitution for the state with a government republican in form (R. 137, 138). In 1858 such a Constitution was adopted, declaring that all real and personal property shall be subject to taxation except certain classes of exemptions not applicable to the property in question (R. 140). A schedule attached to the Constitution continued all contracts and *voided all Territorial Laws repugnant to the Constitution* (R. 141-2). In the same year by Act of Congress, the Constitution was approved as republican in form and the state was admitted to the Union "on an equal footing with the original states in all respects whatever" (R. 157, 158). On February 24, 1872, the school building was surrendered to the City of Red Wing (R. 84). At this time there was no university in existence

and it was not known when or where one would be. *From March, 1869, to September, 1880, no classes were held (R. 79)* Land, part of the present campus in St. Paul, was acquired in 1873 (R. 85) and a building, construction of which was commenced in August, 1873 (R. 88), was completed in July, 1880 (R. 95). From September, 1880, to this time, classes have been held and the university as such functioned. Chapter 43 was amended in 1871, 1876 and 1877 (R. 119-123).

The taxes involved herein were duly levied for the years 1937, 1938 and 1939 against properties owned by the respondent, but which do not form a part of its campus. These properties are largely income-producing; *five tracts are improved with large apartment buildings*; others are improved with stores, apartments and houses (R. 108, 109).

III.

Specifications of Error.

The Supreme Court of Minnesota erred:

1. In affirming the Order and Decree of the District Court of Ramsey County, Minnesota.

2. In holding that income-producing real estate owned by respondent is exempt from taxation because of the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854.

3. In holding that the territorial legislation had power to grant an irrevocable exemption in perpetuity.

4. In holding that the grant of exemption constituted a contract binding on the State of Minnesota.

5. In refusing to hold that the grant of exemption was null and void under the Constitution and Laws of the United States particularly:

(a) Act of Congress of March 3, 1849 (Organic Act of Minnesota).

- (b) Act of Congress of May 11, 1858 (Act admitting State of Minnesota to the Union).
- (c) Article 1, Secs. 8 and 9 of the Constitution of the United States.
- (d) Fifth Amendment to the Constitution of the United States.
- (e) Tenth Amendment to the Constitution of the United States.

6. In refusing to hold that the grant of exemption was a revocable privilege, and as such, was revoked both by the Act of Admission and the adoption of the State Constitution.

7. In holding that respondent, as a matter of law, did not forfeit or abandon its right to exemption by suspension of its teaching functions.

IV.

ARGUMENT.

A. Summary of State Supreme Court's Opinion.

The Supreme Court of Minnesota, in holding respondent's property was exempt from taxation, felt constrained to follow and adhere to the decision in the early case of *County of Nobles v. Hamline University*, 46 Minn. 316, 48 N. W. 1119, which it apparently deemed to be supported by *Home of the Friendless v. Rouse, supra*, and *Washington University v. Rouse, supra*. In *County of Nobles v. Hamline University, supra*, the Court held that the territorial legislature of Minnesota had power to grant and did grant to the Trustees of the Hamline University by the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854, an irrevocable exemption binding on the present state. The Court's sole authority for its holding was *First Div. etc. R. Co. v. Parcher*, 14 Minn. 224 (Gil. 297).

First Div. etc. R. Co. v. Parcher, supra, involved a territorial charter provision for a 3% gross earnings tax "in lieu of all taxes and assessments whatever." Disregarding this provision the State attempted to tax certain lands of the company on an ad valorem basis. These lands had been given to the railroad by the State which had received them from the United States under an Act of Congress to aid the construction of certain railroads. The court held the 3% gross earnings tax provision of the railroad charter to be an irrevocable contract covering taxation of both the land grant lands and operating properties of the company.

Subsequently, the exemption of these so-called land grant lands until sold was sustained on the grounds that it was an agreement made in execution of a trust imposed on the State by the United States. *Stearns v. Minnesota*, 179 U. S. 223, 21 S. Ct. 73, 45 L. E. 162, reversing *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210. However, an increase in the gross earnings tax on the operating property of the railroad to 4% was sustained, and that portion of the opinion of the Court in the *Parcher* case which related to contract right under its charter was rejected as obiter dictum. *Great Northern Railway Company v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446, affirming 106 Minn. 303, 119 N. W. 202. In *Trustees of Pillsbury Academy v. State*, 204 Minn. 365, 283 N. W. 727, aff'd per curiam, 308 U. S. 506, 60 S. Ct. 92, 84 L. E. 433, the Court said that "by the decision in the *Great Northern* case (106 Minn. 103, 119 N. W. 202), *First Division St. Paul and Pacific R. Co. v. Parcher*, 14 Minn. 297 (Gil. 224), and quite a catalog of similar cases following it, were in part distinguished and impliedly at least disapproved."

Every statement of law in the *Parcher* case except that relating to the trust involved in the handling of land grant lands by the territory for the United States was fully

discredited and rejected. *Great Northern Railway Company v. Minnesota*, *supra*; *Stearns v. Minnesota*, *supra*; *Trustees of Pillsbury Academy v. State*, *supra*.

In the instant case, however, the Supreme Court of Minnesota apparently revives and approves the contract holding of the *Parcher* case on which the decision in *County of Nobles v. Hamline University*, *supra*, was predicated, saying of the *Parcher* case: "We are favorably impressed with it."

A schedule to the Minnesota Constitution of 1857 contained two provisions. The first declared:

(1) " * * * that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; * * *"

The second provided:

(2) "All laws now in force in the territory of Minnesota not repugnant to this constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature."

The Minnesota Supreme Court clearly indicated that it was only as a contract right such as would be protected by the United States Constitution that the grant of exemption was affected by the first provision of the Schedule. It said:

"The adoption of the state constitution, upon which reliance is placed for the present claim of right to tax Hamline's property, could not change its granted rights if these were contractual obligations."

and, further,

"In addition, the people of the state, in adopting their constitution, recognized and assumed the validity of all existing contract obligations and rights created thereby."

In *First Div. etc. R. Co. v. Parcher*, *supra*, the Court, after holding that the charter grant was a contract protected by the United States Constitution, referred to Sec. 1 of the Schedule to the State Constitution as "perhaps unnecessary," which no doubt it was, in view of the protection afforded by Article 1, Sec. 10 of the federal constitution.

The Supreme Court, in addition to stressing *Home of the Friendless v. Rouse*, *supra*, and *Washington University v. Rouse*, *supra*, placed great reliance on the case of *Board of Trustees for Vincennes University v. State of Indiana*, 55 U. S. (14 How.) 268, 14 L. E. 416, which seems to be wholly inapplicable to this situation. In that case, there being a direct grant by Congress of certain lands for the use of a seminary, the only question was whether title to a particular tract of property had vested in the university. The case of *Perry v. United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. E. 12, cited by the court, is inapplicable because no question concerning the surrender of sovereignty was there involved.

Res Judicata Not Considered by State Court.

The Supreme Court of Minnesota in adhering to its decision in the early *Hamline University* case did not invoke the doctrine of *res judicata* as did the Court of first instance in addition to its holding on the contract phase of the charter grant. The only reference thereto in the opinion is the Court's statement that "in this case Hamline has urged as an additional reason for affirmance the doctrine of *res judicata* of what was there (*County of Nobles v. Hamline University*) determined." It is clear from the discussion of the early *Hamline University* case, as well as other cases relating to the powers vested in the territorial legislature, that the Supreme Court based its decision solely on the merits of the questions presented for consideration.

The Supreme Court of Minnesota has evinced a desire to have the federal questions here presented finally decided on the merits by this court. *Trustees of Pillsbury Academy v. State, supra.*

This court will not assume that the State Supreme Court invoked the doctrine of res judicata so as possibly to limit its right to review in the absence of a direct holding. See concurring opinion of Chief Justice Hughes in *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, 84 L. E. 537.

B. Lack of Power to Grant Irrevocable Exemption.

Territories Not "Sovereign".

Territorial statutes depend for authority on the Acts of Congress and must conform thereto and to the Constitution of the United States. Corpus Juris, Vol. 59, "Statutes," Sec. 12, page 523; *Domenech v. National City Bank*, 294 U. S. 199, 55 S. Ct. 366, 79 L. E. 857.

A clear distinction exists between the powers of territorial and state governments. Corpus Juris, Vol. 62, "Territories," Secs. 8 and 9, pp. 788-790 incl.

In *Domenech v. National City Bank, supra*, this court stated (p. 204): "Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty, comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States."

Discriminatory Taxation by an Agency of Congress Is Prohibited by the United States Constitution and Organic Act of the Territory.

The exemption granted to the respondent in its charter applies to all its property, regardless of the use made of it, and in perpetuity. The exemption was patently arbitrary

and discriminatory, and one not based on any classification of property for taxation purposes. As stated by this court in *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 L. E. 225: "It is the contract of exemption which, in the very nature of things, characterizes the grant as a special privilege."

Article 1, Secs. 8 and 9 of the United States Constitution required a measure of equality and uniformity of taxation by the Congress and the territorial legislature. *Loughborough v. Blake*, 18 U. S. (5 Wheat.) 317, 5 L. E. 98; *Gibbons v. District of Columbia*, 116 U. S. 404, 6 S. Ct. 427, 29 L. E. 680; *Peacock v. Pratt*, 121 Fed. 772.

The inhibition of the Fifth Amendment to the Constitution applies to the federal government and agencies set up by Congress for the government of the territory. *Farrington v. Tokushige*, 273 U. S. 284, 47 S. Ct. 406, 71 L. E. 646. It is well established that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment. *Heiner v. Donnan*, 285 U. S. 312, 326, 52 S. Ct. 358, 361, 76 L. E. 772.

Sec. 6 of the Organic Act prohibited discriminatory taxation. *McComb v. Bell*, 2 Minn. 295 (Gil. 256). The parties hereto stipulated that "there was a substantial amount of property in the territory of Minnesota subject to taxation under the general laws of the territory and then owned by residents and non-residents of the territory" (R. 106).

The portion of the opinion in the *Parcher* case holding that the railroad charter tax provision was not void as discriminatory under the Organic Act of the territory, has been reconciled by this court on the basis that it was presumed that the commuted taxes paid by the railroad were a fair equivalent of the taxes which would have been paid on an ad valorem basis as in *McHenry v. Alford*, 168 U. S. 651, 18 S. Ct. 242, 42 L. E. 614; *Stearns v. Minnesota*, *supra*.

C. Exemption Does Not Constitute a Contract Binding on State.

It is very clear that there is nothing in the United States Constitution which contemplates or authorizes any direct abridgment by national legislation of the power of states to tax. *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71, 19 L. E. 101; *Texas v. White*, 74 U. S. (7 Wall.) 700, 19 L. E. 227.

A territorial statute, even though it contains all the elements of a contract is subject to the plenary power of Congress and may be repealed by an Act of Congress. *Mormon Church v. United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. E. 478; *Welch v. Cook*, 97 U. S. (VII Otto) 541, 24 L. E. 1112.

The Organic Act of Minnesota, Sec. 6, provided "all the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect." The absence of any act by Congress is not to be construed as a recognition of the power of the legislature to pass laws in conflict with the Act of Congress under which it was created. *Clayton v. Utah Territory*, 132 U. S. 632, 10 S. Ct. 190, 33 L. E. 455.

However, even if Congress had approved or enacted the legislation it would be subject to the same legal objections. *Welch v. Cook*, *supra*.

Exemption Is a "Revocable Privilege" and Not a "Contract Right" Protected by Article 1, Sec. 10 of the United States Constitution.

Where there exists in the legislative power the right to amend or modify the grant of exemption, it is merely a "revocable privilege" and not a "contract right." *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 19 S. Ct. 530, 43 L. E. 840. *Seton Hall v. So. Orange*, 242 U. S. 100, 37 S. Ct.

54, 61 L. E. 170. *Troy Union R. R. Co. v. Mealy*, 254 U. S. 47, 41 S. Ct. 17, 65 L. E. 123.

In *Trustees of Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. E. 627. Justice Story in his concurring opinion clearly stated in three different places that had the legislature reserved the right to amend the charter, the principles of the decision would not apply.

Properly Construed as a Revocable Privilege, the Purported Exemption Repealed by State Constitution and Statutes.

The exemption grant was repugnant to the constitution of the State of Minnesota. *State v. Chicago Great Western Ry. Co.*, 106 Minn. 290, 119 N. W. 211. *State v. Great Northern Railway Company*, 106 Minn. 302, 119 N. W. 202. *Great Northern Railway Company v. State of Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446.

The right of modification and repeal being inherent in Congress existed in the instant case until the first moment of existence of the State of Minnesota. Full right to enact its own laws was given by Congress to the new State as an incident of transferred sovereignty. This included the right to supersede the territorial enactments. This the state did, by the adoption of its constitution. There being no irrevocable contract, no right of the respondent was violated by the adoption of the constitutional prohibition. *Welch v. Cook*, *supra*.

As a Revocable Privilege, the Purported Exemption Was Repealed by Act of Congress of May 11, 1858 (Act of Admission).

The Congressional Act of May 11, 1858 declared that the State of Minnesota be "admitted into the Union on an equal footing with the original states in all respects whatever."

The power given to Congress by Article 4, Sec. 3 of the federal constitution is to admit new states which are equal in power, dignity and competency to assert the residuum of sovereignty not delegated to the federal government. *Coyle v. Oklahoma*, 221 U. S. 559, 567, 31 S. Ct. 688, 55 L. E. 853. The right of every new state to exercise all the powers of government which belong to or may be exercised by the original states of the Union must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands. *Sands v. Manistee River Improvement Company*, 123 U. S. 288, 8 S. Ct. 113, 31 L. E. 149 and cases cited therein.

The rule of law established in *Sands v. Manistee River Improvement Company*, *supra*, is equally applicable here. The power of taxation is inherent in sovereignty and is an incident of sovereignty. The State of Minnesota on her admission had the right, as an attribute of sovereignty, to exercise this "basic power of government" without any limitation thereon.

D. If Exemption Constitutes Contract Binding on State, Respondent Forfeited "Special Privilege" of Immunity from Taxation by Non-Compliance With Charter.

The parties hereto stipulated that the teaching functions of the University were suspended from March, 1869 to September, 1880 inclusive (R. 79, f. 236).

The petitioner does not claim, as indicated by the decision of the Supreme Court of Minnesota, that respondent's charter has been lost by abandonment or otherwise. Exemption from taxation is not a right, privilege, or immunity which is included within a corporation's franchises. *State v. Great Northern Railway Company*, 106 Minn. 302, 119 N. W. 202; *Great Northern Railway v. State of Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446; *Morgan v. Louisi-*

ana, 93 U. S. 217, 23 L. E. 860. The grant of exemption is not one of respondent's "charter rights." It is petitioner's contention that respondent's failure to maintain and conduct an institution of learning as required by its charter constituted, as a matter of law, the forfeiture of its "special privilege" of exemption from taxation without requiring the State of Minnesota to bring a quo warranto action to forfeit the charter. *State v. Chicago Great Western Ry. Co.*, 106 Minn. 290, 119 N. W. 211; *Trustees of Pillsbury Academy v. State*, *supra*.

Conclusion.

The exemption provision in respondent's charter applies to all its real and personal property regardless of the use made of it. The exemption granted to respondent is not in accord with the general tax laws of the territory enacted in 1851 which subjected all property, except certain classes of property expressly exempted, to taxation on an ad valorem basis. Property owned by a University solely for revenue purposes was not included within the exempt classes of property. The same is true under the State's present constitutional and statutory provisions.

We are endeavoring to bring about a situation in which the respondent will be treated the same as other universities and colleges located in the State of Minnesota. The loss of revenue to the State of Minnesota by reason of this unlimited exemption is now considerable and may become very serious if this exemption grant in perpetuity is sustained. The respondent should bear its proper and equal burden of taxation along with other taxpayers who own income-producing property. It is not fair to the taxpayers of Minnesota that respondent should be favored by immunity from taxation as to its income-producing property.

We desire to reiterate once more that this Court has never passed on the basic question presented herein relating to

the power of the territorial legislature to grant an irrevocable exemption in perpetuity binding on the state. On the basis of the fundamental distinctions between a "territory" and a "state," it may not be necessary to reexamine the decisions in the early *Rouse* cases. We do believe, however, that the rule established in those cases, permitting a state to bargain away its taxing power, is erroneous and should be overruled; at least, it should not be extended to permit the Territory to bargain away the taxing power of a future state.

We submit that the Petition for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota, involving fundamental federal constitutional questions, should be granted by this court.

Respectfully submitted,

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SEP. 11 1944

CHARLES EMMORE CROLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1944

No. 359

STATE OF MINNESOTA,

Petitioner,

vs.

TRUSTEES OF THE HAMLINE UNIVERSITY OF MINNESOTA, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

**BRIEF FOR TRUSTEES OF THE HAMLINE UNIVERSITY
OF MINNESOTA IN OPPOSITION**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1944

No. 359

STATE OF MINNESOTA,

Petitioner,

vs.

TRUSTEES OF THE HAMLINE UNIVERSITY OF MINNESOTA, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

**BRIEF FOR TRUSTEES OF THE HAMLINE UNIVERSITY
OF MINNESOTA IN OPPOSITION**

THE FACTS

Chapter 43 of the Laws of the Territorial Assembly of Minnesota for 1854 granted to "Trustees of the Hamline University of Minnesota" (hereinafter for convenience called the respondent) a charter to conduct an educational institution (R. 112-119). Section 11 provided that "all corporate property belonging to the institution, both real and personal is, and shall be free from taxation". The charter was accepted by respondent (R. 180) and a preparatory depart-

ment was opened on November 16, 1854, and the college proper in 1857 (R. 36, 37). Until 1869 this was the only institution of college rank in Minnesota (R. 67). By 1867 it had sent out upwards of 200 teachers to the common schools (R. 54). The school was beset with financial difficulties throughout, and in 1869 the trustees, pursuant to the provision of the charter (section 4) that they shall at no time "be required to exceed the means under their control", suspended the teaching functions (R. 69-71). During these and following years respondent suffered from the consequences of the depression following the Civil War, financial panics, grasshopper and other insect plagues, low prices for agricultural products, and general hard times; but it continuously and persistently solicited pledges and raised funds, obtained legislation to permit change of location, acquired lands and erected buildings, all of which resulted in the resumption of the teaching functions in a new location with substantial and adequate buildings, equipment and staff, in 1880 (R. 79-95, 182-184, 251-252). It has ever since conducted a university of recognized rank. It has approximately 600 students, 90% of whom are residents of Minnesota (R. 184). The cost of educating them in tax-supported institutions would have been far more than the value of the tax exemption (R. 106, 185), and respondent's services to the state "greatly exceed the amount of taxes now or which are likely to be involved in the foreseeable future" (R. 252). Respondent has at all times complied with the terms of its charter and at no time did it abandon its object or its property (R. 180-184, 256-257).

PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Organic Act of the Territory of Minnesota, enacted on March 3, 1849, provided (section 6) "that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act * * *".

Respondent's charter was granted by the Territorial Assembly on March 3, 1854 (Laws of 1854, Chap. 43; R. 112-119). It provided:

"* * * all corporate property belonging to the institution, both real and personal is, and shall be free from taxation" (section 11).

On October 13, 1857, the people of the Territory, pursuant to the Act of Congress of February 26, 1857, authorizing a state government, adopted the Constitution of the State of Minnesota (*Minn. Stats. 1941*, pp. 24-54). Section 1 of the Schedule, which is a part of the Constitution (*Minn. Stats. 1941*, p. 51) provides:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights * * * and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place * * *."

Article 1, section 11 of the Constitution of Minnesota provides:

"No * * * law impairing the obligation of contracts shall ever be passed * * *" (*Minn. Stats. 1941*, p. 25.)

Article 1, section 10 of the Constitution of the United States provides:

"No state shall * * * pass any * * * law impairing the obligation of contract * * *"

THIS COURT IS WITHOUT JURISDICTION TO REVIEW

The Statute of a Territory Is Not a "Statute of the United States" or a "Statute of Any State."

Section 237 (b) of the Judicial Code authorizes review by certiorari of the judgment of a state court where is drawn in question "the validity of a * * * statute of the United States", or where is drawn in question "the validity of a statute of any State" on the ground of its being repugnant to the Constitution or laws of the United States.

The charter creating the contract of tax exemption was granted initially by the Territory of Minnesota. If the contract rests on the original grant there would be drawn in question the validity of a statute of the Territory. The review authorized by the Judicial Code is limited to cases involving the validity of statutes of the United States or of the states. It does not include the statute of a territory, whether it be held valid or invalid. *Scott vs. Jones*, 5 How. 343; *Miners' Bank vs. Iowa*, 12 How. 1; *Messenger vs. Mason*, 10 Wall. 507.

The power of Congress to disapprove the territorial act did not make the charter an Act of Congress rather than that of the territorial government. A territorial statute enacted under authority of Congress previously granted is to be treated as emanating from its immediate source and not as an Act of Congress. *Miners' Bank vs. Iowa*, *supra* (pp. 7-8); *Honolulu Rapid Transit & Land Co. vs. Wilder*, 211 U. S. 137, 142.

The only question that might arise under the Organic Act, under the authority of which the territory acted, would be one of interpretation, not of the validity, of that act, and therefore not one subject to review by this court.

The case of *Christianson vs. King County*, 239 U. S. 356, cited by petitioner, did not arise under section 237 (b) of

the Judicial Code relating to review by this court, but under sections 128 and 241, relating to the finality of judgments of circuit courts of appeal and review of decisions of those courts by the Supreme Court. The only limitation imposed by section 241 upon the review of judgments of circuit courts of appeal that are not made final by the Judicial Code is that the matter in controversy shall exceed one thousand dollars. It was therefore competent for this court to review a decision of a circuit court of appeals in a case involving the *construction* of a statute of the United States, whereas by section 237 (b) jurisdiction to review is limited to cases involving the *validity* of statutes of the states and of the United States.

The case of *Welch vs. Cook*, 7 Otto 541, has no application.

The State Court Sustained the Charter Exemption on an Adequate Non-federal Ground.

The trial court found that the charter was a contract the obligations of which are protected by the contract clause of article 1, section 10 of the Constitution of the United States and by article 1, section 11 of the Constitution of Minnesota, which provides that "no * * * law impairing the obligation of contracts shall ever be passed" (R. 179-180; *Minn. Stats. 1971*, p. 25). Its conclusions of law were to the same effect (R. 197). The decree adjudges that the charter constitutes a contract the obligations of which are protected against impairment by the cited provisions of both Constitutions (R. 208). The findings and conclusions were assigned as error by petitioner on appeal to the Supreme Court of Minnesota (R. 246, 248). That court, without specifically indicating whether its decision was based on one Constitution or on the other, affirmed the judgment without qualification (R. 261).

The opinion makes no mention of either article 1, section 10 of the Constitution of the United States, or article 1, section 11 of the Constitution of Minnesota.¹ Only four decisions of this court are cited in the opinion. One is *Board of Trustees for the Vincennes University vs. Indiana*, 14 How. 269 (R. 260), cited to the proposition that a territorial legislature has power to grant an act of incorporation and that the corporate powers were not affected and could not be affected by the Constitution of the state, which provided, as does the Constitution of Minnesota, for the continuance of all contracts. Another is *Perry vs. United States*, 294 U. S. 330 (R. 257), cited to the proposition that the adoption of the state Constitution could not change granted rights if these were contractual obligations. The others are *Home of the Friendless vs. Rouse*, 8 Wall. 430, and *Washington University vs. Rouse*, 8 Wall. 439 (R. 255), cited in subdivision 1 of the opinion which dealt solely with necessity of consideration to sustain a contract. The opinion states that these cases hold that grants of tax immunity of the type here involved are protected by the federal Constitution, and directly thereafter it quotes an excerpt from the former case dealing with consideration alone. By its passing reference to these cases in pointing out that consideration for the contract was present, the state court did nothing more than say that the consideration was present in this case as it was in those.

The court followed in all respects its earlier decision in *County of Nobles vs. Hamline University*, 46 Minn. 316, which presented the same questions as those presented in the case at bar (R. 258-259). The Constitution of the United States is not referred to in the pleadings, the record or the

¹In this respect the decision is like one in which no opinion is written and resort is had to the decision of the trial court to determine whether an exclusive federal question was presented. See *Wood Mowing & R. M. Co. vs. Skinner*, 139 U. S. 293; *Southwestern Bell Tel. Co. vs. Oklahoma*, 303 U. S. 206.

judgment in the Nobles County case (R. 173-195)^{1a} and no mention of it is made in the opinion, which holds "that the territorial legislature had the power to grant this exemption, and bind the future state" (p. 316).

In the County of Nobles case the state court followed its decision in *First Division St. P. & P. R. Co. vs. Parcher*, 14 Minn. 297. The opinion in the Parcher case makes no mention of the Constitution of the United States. In answer to the contention that even if the territorial legislature could bind the territory it had no power to alienate or abridge the sovereign authority of the future state, the court said that *Dartmouth College vs. Woodward*, 4 Wheat. 651, would be a sufficient answer, "But section 1 [the contract adoption provision] of the schedule of our constitution sets this matter at rest * * *." It then quotes the section and says, "This provision was perhaps unnecessary, *but it is at any rate decisive*" (p. 327). (Italics supplied.) Neither of these cases refer to any one of the several decisions of this court in which the federal Constitution was invoked to protect a contract of tax exemption.

If the state court did not rest its decision on the contract clause of the Constitution of the United States alone, the ground on which the decision otherwise rests is not important so long as it is not a federal one. While the contract impairment clause of the state Constitution is not mentioned in the opinion, its inclusion in the findings, conclusions and judgment of the trial court, affirmed by the state court, indicates that the decision was rested on that provision.

It is, as indicated by headnote 3² of the opinion (R. 249), also rested on the general proposition of law that the par-

^{1a}The certified copy of the files in the Nobles County case was in the record of this case (R. 158-159), but was not printed. The reference is to the printed record of the companion case, No. 358.

²"A valid legislative grant amounting to a contract may not be impaired by subsequent legislation."

ties to a valid contract are bound by its terms, as held in *Perry vs. United States*, *supra*, cited in the subdivision of the opinion supporting headnote 3 (R. 257), especially where the people by their Constitution have adopted the contract and assumed its performance. In *Perry vs. United States*, *supra*, this court held binding a governmental contract without resort to constitutional protections.

Furthermore, the state court, following its earlier decisions, relied upon and stressed (R. 253-254, 260, 261) the contract adoption provision (Schedule, section 1) in the state Constitution as one which in and of itself prohibited executive and legislative action in violation of its terms, as did also the trial court (R. 179).

From the record and from the state court's opinion it is plain that the decision rests on one or more of three grounds, viz.: the impairment of contract clause of the state Constitution, the inviolability of a contract under general law, and the contract adoption provision of the state Constitution; and if it may fairly be said that it rests on any one of them this court is without jurisdiction.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the termination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. * * *

Lynch vs. New York, 293 U. S. 52, 54-55, citing numerous cases.

Rule 20 of the Supreme Court of Minnesota (212 Minn., p. XLVI) permits an application for rehearing within ten days after the filing of the decision. Petitioner's failure to avail itself of this means of having the state court specify the basis of its determination warrants denial of the petition. See *Lynch vs. New York, supra* (p. 55).

NO REASON FOR ALLOWING THE WRIT IS PRESENTED

The case presents no element which under the rules of this court, or upon any other consideration, warrants review, if the court should determine that it has jurisdiction.

1. Basically, a writ to review is granted only when the state court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court" (Rule 38, 5 (a)).

Assuming that a federal question is presented, that question has been decided by this court many times. The decision of the state court conforms to all of the decisions of this court, from *New Jersey vs. Wilson*, 7 Cranch 164, decided in 1812, to now.

2. If it be thought that the court should, as suggested in the petition and supporting brief, decide whether a contract of tax exemption for a continuing consideration by any government in the American system would constitute an impairment of sovereignty, attention is directed to repeated decisions of that question by this court and discussions of it in both majority and minority opinions.

Piqua Branch of State Bank of Ohio vs. Knoop, 16 How. 369.

Jefferson Branch Bank vs. Skelly, 1 Black 436.

The Home of the Friendless vs. Rouse, 8 Wall. 430.

The Washington University vs. Rouse, 8 Wall. 439.

The Wilmington & Weldon Railroad Co. vs. Reid, 13 Wall. 264.

The East Saginaw Salt Mfg. Co. vs. City of East Saginaw, 13 Wall. 373.

Humphrey vs. Pegues, 16 Wall. 244.

Furthermore, at least where the contract is affirmed by the state Constitution itself, the question is one of state sovereignty and beyond federal control or restriction so long as the state maintains a republican form of government, and that is a political, not a judicial, inquiry. *Highland Farms Dairy vs. Agnew*, 300 U. S. 608, 612.

3. The history of respondent's charter itself presents cogent reasons for refusing the writ. The charter was granted in 1854 (Laws 1854, Chap. 43). More than fifty years ago the Supreme Court of Minnesota sustained the tax exemption provision of the charter against the same objections as those made now. *County of Nobles vs. Hamline University, supra*. More than 25 years ago the same court sustained the exemption against the claim that a limitation in the charter had been transgressed. *State vs. W. L. Harris Realty Company*, 148 Minn. 20. In 1930 the exemption was sustained by a default judgment of the District Court of Ramsey County in a proceeding for registration of title in which the state was a party defendant (R. 190). In 1940 it was again sustained by a judgment entered, on default by the state and on stipulation by the county, by the District Court of Redwood County in a like proceeding (R. 191-192, 242-244). Between 1929 and 1938 the validity of the exemption was admitted and sustained by judgments or orders for judgment upon stipulation in the District Court of Ramsey County in ten separate proceedings instituted for the enforcement of

taxes sought to be levied on respondent's real estate (R. 189, 190, 226-241).

Aside from these fruitless, and by the Ramsey County authorities frivolous, attacks upon the charter, the validity of the exemption has uniformly been recognized by the taxing authorities (R. 186) and upheld by numerous opinions promulgated by the Attorney General of Minnesota (R. 234-242).^{2a} The present decision of the Supreme Court of Minnesota should stand and respondent be freed of further litigation.

4. The language of the opinion in this case clearly shows that the state has been more than repaid for the exemption from taxation (R. 252, 254-255; see also R. 106, 185). There is nothing in the record to substantiate the claim that the grant was improvident.

5. Contractual exemptions from taxation like that contained in respondent's charter are held by many educational and charitable institutions and others. Some are evidenced by the reports of this court and of state courts. Some are even older than is respondent's. All have been relied upon for long periods of time. Reopening at this late date the question of their validity, which has been settled by decisions of this court running back more than a hundred years, would be of deepest concern to these institutions. It should be deferred until such time as this court may be compelled to do so on appeal from a decision striking down an exemption (e. g., *Trustees of Pillsbury Academy vs. Minnesota*, 204 Minn. 365, 308 U. S. 506), or at least until there is presented a petition for a writ which shows indubitably that the decision of the state court rests on a federal ground.

^{2a}These opinions are part of the record (R. 165), but were not printed. The reference is to the printed record in the companion case, No. 358.

ARGUMENT

The argument will in the main follow the order of petitioner's brief.

Summary of State Court's Opinion.

Petitioner's argument under this head calls for brief comment.

The state court followed *County of Nobles vs. Hamline University, supra*, and *State vs. W. L. Harris Realty Co., supra*, which were in turn based on *First Division St. P. & P. R. Co. vs. Parcher, supra*. The Parcher case involved the validity of a territorial charter which, in consideration of a commuted system of taxation, exempted from tax certain granted lands. The property of the corporation, including the franchises, was acquired by the state under mortgage foreclosure and thereafter transferred to First Division St. P. & P. R. Company. The court held, against the same objections as those presented here, that the territorial legislature had power to make the contract, that the exemption did not invade the protection afforded non-residents by the Organic Act, and that the contract was binding on the state, resting the latter ground on the contract adoption clause of the state Constitution.

State vs. Great Northern R. Co., 106 Minn. 303 (affirmed, 216 U. S. 206), cited by petitioner, arose under the same initial charter and involved the question whether the commuted tax provision exempting from taxation property other than the granted lands involved in the Parcher case survived acquisition by the state of the corporation's property and franchises under mortgage foreclosure subsequent to the adoption of the state Constitution which required that all property be taxed, their restoration to the corporation, their reacquisition by the state by forfeiture, their transfer by the

state to a new corporation, their acquisition by another corporation through mortgage foreclosure, and their transfer to still another corporation.

The court decided only that the charter provision, so far as the commuted tax feature was concerned, was personal to the corporation and not subject to transfer, and that the subsequent legislative acts passed no exemption to the new company because exemptions were then prohibited by the state Constitution. It said the right of a state through its legislature to limit by contract its power of taxation when not restricted by constitutional provisions is "too firmly established to admit of discussion at this time. * * * The question must be deemed for present purposes completely at rest" (p. 322). After pointing out that a fair construction of the language would seem to justify the conclusion that the tax exemption was not irrevocable, it said:

"We are, of course, not to be understood as intimating an opinion that a contract of the tenor and effect of the one claimed could not legally have been entered into by the territory * * *" (p. 324).

That decision leaves undisturbed the holding in the *Parcher* case which was followed in the *County of Nobles* case, and expressly approved in the state court's opinion in the case at bar.

Petitioner's brief (p. 14) says that the court's opinion in the case at bar "clearly indicated that it was only a contract right such as would be protected by the United States Constitution that the grant of exemption was affected by the first provision of the Schedule" and quotes the statement in the opinion that the state Constitution could not change respondent's granted rights "if these were contractual obligations". This statement is nothing more than that there was a *contract*. The court later points out (R. 260) that by the adoption of the Constitution the people recognized and as-

sumed the contract, and makes no mention of the contract clause of the Constitution of the United States.

Similarly, petitioner's brief (p. 15) states that in the *Parcher* case it was held that the charter was a contract "protected by the United States Constitution". As has already been pointed out, what was said in the *Parcher* case was that the doctrine of *Dartmouth College vs. Woodward*, *supra*, would be sufficient basis for holding that the territorial contract was binding on the succeeding state, *but* that the contract adoption clause of the state Constitution "sets the matter at rest" and "is decisive" (p. 327).

The Territory had Power to Contract for an Irrevocable Tax Exemption.

The legislative power granted the territory by the Organic Act (section 6) extended to "all rightful subjects of legislation". The legislative and contract authority of the territory is as broad as that of a state. *Clinton vs. Englebrecht*, 13 Wall. 434; *Maynard vs. Hill*, 125 U. S. 190; *Cope vs. Cope*, 137 U. S. 682; *W. C. Peacock & Co. vs. Pratt* (C. C. A. 9), 121 Fed. 772, 775; *Kitagawa vs. Shipman* (C. C. A. 9), 54 F. (2d) 313; *Yerian vs. Territory of Hawaii* (C. C. A. 9), 130 F. (2d) 786; *Bennett vs. Nichols*, 9 Ariz. 138; *Winona & St. P. & P. R. Co. vs. County of Deuel*, 3 Dak. 1; *First Division St. P. & P. R. Co. vs. Parcher*, *supra* (pp. 326-327).

A state may make a contract granting an irrevocable exemption from taxation. *Piqua Branch of State Bank of Ohio vs. Knoop*, *supra*; *Jefferson Branch Bank vs. Skelly*, *supra*; *The Home of the Friendless vs. Rouse*, *supra*; *The Washington University vs. Rouse*, *supra*; *East Saginaw Salt Manufacturing Co. vs. City of East Saginaw*, *supra*; *Humphrey vs. Pegues*, *supra*; *The Northwestern University vs. People*, 99 U. S. 309; *St. Anna's Asylum vs. City of New Orleans*, 105 U. S. 362.

A Legislative Grant of Exemption From Taxation Is Not an Impairment of a Sovereign Power.

For well over a century the established law in this country has been that a legislative grant of exemption from taxation based on a consideration is a valid contract.

Dissenting opinions in some cases argue that a sovereign power may not be impaired. The answer has been made that "it is of the essence of sovereignty to be able to make contracts and give consents upon the exertion of governmental power". *United States vs. Bekins*, 304 U. S. 27, 52 (citing among other cases *New Jersey vs. Wilson*, *supra*, and *Jefferson Branch Bank vs. Skelly*, *supra*,³ both of which involve contracts of tax exemption). And again the answer given to the argument that "the government cannot by contract restrict the exercise of a sovereign power" is that "the right to make binding obligations is a competence attaching to sovereignty". *Perry vs. United States*, *supra*, p. 353. See also 57 *Harvard Law Review* (May, 1944) 640, 653-654.

The argument of the dissents to the effect that taxation is like eminent domain and police power, which latter cannot be contracted away, is unsound. See *Stone vs. Mississippi*, 11 Otto 814, 820. Police power and eminent domain are direct governmental controls exercised over persons and property. These must be retained in kind to be effective. But taxation is only to raise revenue, and this can be accomplished in many different ways. Any one source of taxation is not vital. A dollar is a dollar from whatever source derived. Taxation is, like borrowing money, a matter of finance, and the power of the state to contract in this field is well recognized and is a matter of public necessity and

³These two cases were cited in *First Division St. P. & P. R. Co. vs. Parcher*, 14 Minn. 297, *supra*, in answer to the argument that the taxing power is a sovereign power which the legislature may not alienate or abridge.

convenience. A state may by contract borrow money and agree to pay it back, binding future legislatures; so a state may for a consideration agree not to take money in the future—not to tax the property out of the use of which the consideration flows. They are but different ways of securing the public service that is to be performed.

Nor is the other argument of the dissenting opinion valid—that the power to contract for tax exemption should not exist because it may be abused. Any legislative power may be abused, some even to jeopardize the existence of the state, such as the powers to borrow money, to appropriate and spend money, and to dispose of state property. But this does not mean that the powers do not exist. If control of them is necessary, limitations on them may be put in the constitutions. In the present case, far from any abuse of the tax exemption, there is evident noteworthy public service and a contract favorable to the state.

The Grant of Tax Exemption Was Not Violative of Any Restriction Upon the Powers of the Territory.

The Organic Act (section 6) provides that the lands and other property of non-residents shall not be taxed higher than the lands and other property of residents. Assuming that the corporation is a resident within the meaning of this language (quaere, see *First Division St. P. & P. R. Co. vs. Parcher*, *supra*), the restriction prohibits discrimination only against the citizens of another state as such. *Logan vs. Young*, 191 Minn. 371. In any event, that question could be raised only by a non-resident affected.

In *Berryman vs. Whitman College*, 222 U. S. 334, cited by petitioner, the court assumed that a valid contract of exemption could be granted by a territory in the absence of express limitations, and held only that the Organic Act of Washington contained such a limitation.

The 5th Amendment has no application. Even the equal protection clause of the 14th Amendment does not prohibit exemptions from taxation. *Chicago vs. Sheldon*, 9 Wall. 50; *Mobile & Ohio R. Co. vs. Tennessee*, 153 U. S. 486; *New York ex rel. Metropolitan Street R. Co. vs. State Board of Tax Commissioners*, 199 U. S. 1. Scores, if not hundreds, of tax exemptions have been sustained by the courts and there appears to be no case where such exemption has been struck down on the ground that it denied equal protection of the law or that it took property without due process of law. Furthermore, only one who has been injured may raise the question.

No question under article 1, sections 8 and 9 of the Constitution of the United States was raised in the state court. Furthermore, the requirement of uniformity in section 8 applies only to duties, imports and excises; and the only provisions in section 9 relating to taxation are that direct taxes shall be laid in proportion to population and that taxes shall not be laid on exports from states.

The Territory Was Without Power to Revoke the Contract of Exemption.

Having exercised its authority with respect to a "rightful subject of legislation", i. e., the granting of the exemption, the territory was without authority to repudiate or revoke it. That is a rule of general law, applicable to governmental bodies as well as individuals. *Sinking Fund Cases*, 9 Otto 700, 718; *Lynch vs. United States*, 292 U. S. 571; *Perry vs. United States*, *supra*, pp. 351-353.

The Organic Act provided that legislation passed pursuant thereto "shall be submitted to the Congress * * * and, if disapproved, shall be null and of no effect". While Congress thus had power to disapprove, the territorial act nevertheless remained in full force and effect unless and until Con-

gress exercised that power. *Atchison, T. & S. F. R. Co. vs. Sowers*, 213 U. S. 55; *Denver & Rio Grande R. Co. vs. Wagner* (C. C. A. 8), 167 Fed. 75. Since there was no disapproval, respondent's charter was in full force and effect when the people of the territory changed their form of government and by their Constitution continued the contract.

The territorial statute is to be treated as emanating from its immediate source and not as an Act of Congress. *Miners' Bank vs. Iowa*, *supra*, pp. 7-8; *Honolulu Rapid Transit & Land Co. vs. Wilder*, *supra*, p. 142.

Respondent's contract was with the territory, not with Congress; and the termination of the life of the territory before the exercise by Congress of its power to disapprove left the charter and all of its provisions a valid and enforceable contract at the moment it was assumed by the state through the inclusion in the state Constitution of the Schedule continuing existing contracts.

The Contract of Exemption Is Binding on the State Both Under General Law and Under the State Constitution.

A change in the form of government does not extinguish its obligations or destroy existing rights. *The Board of Trustees for the Vincennes University vs. Indiana*, *supra*; *Dartmouth College vs. Woodward*, 4 Wheat. 518; *New Jersey vs. Wilson*, *supra*; *Baxter vs. State of Wisconsin*, 9 Wis. 38; *Jewell Nursery Company vs. State*, 4 S. D. 213.

In addition, the Schedule of the state Constitution adopted by the people of the territory specifically continued existing contracts.

The Charter Exemption Was Not Repealed by the Act Admitting Minnesota to the Union.

It has never been thought that holding a state to a contract made by its predecessor government prevents its admission to the Union on an equal footing with the original states. If otherwise that were a discrimination, the short answer is that the original states likewise were bound by contracts made by predecessor governments: the King in *Dartmouth College vs. Woodward*, *supra*, and the Colony in *New Jersey vs. Wilson*, *supra*. And if that were not enough, the people of Minnesota in their Constitution voluntarily adopted and continued respondent's charter contract.

The Right to Exemption Has Not Been Lost By Non-compliance With the Charter.

Whether it be called a franchise, a right, or a privilege, a contract for exemption from taxation is an integral part of the corporate charter. The cases cited in petitioner's brief under this head (p. 20) hold no more than such a right cannot be *transferred* unless it inheres in particular property. The holding in *Morgan vs. Louisiana*, 3 Otto 217 (which cites with approval *Home of the Friendless vs. Rouse*, *supra*), falls short even of that. The ultimate decision is that "such immunity is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property". The exemption from taxation of the corporation's property continues at least as long as it is devoted to its own corporate purposes, in this case the maintenance of the University.

The claim of non-compliance is based on the fact that respondent's teaching functions were temporarily suspended. This was due to the depression following the Civil War, a nation-wide financial crisis, grasshopper and other insect

plagues, low prices for agricultural products, and general hard times, and was accompanied by constant and unremitting efforts to resume teaching. (See statement of facts, *supra*, pp. 1-2.) The trial court found that respondent has at all times complied with its charter (R. 180) and that at no time did it abandon its charter or object or property (R. 183). The Supreme Court of the state held that "the suspension was not a voluntary one; rather, it was caused by forces beyond the control of any human agency" (R. 256) and sustained a finding that there was "neither abandonment nor surrender of the grant" (R. 257).

The same issue was tried and disposed of in favor of respondent in the County of Nobles case in 1891 (R. 173-192).^{3a}

Furthermore, under Minnesota law the state can avail itself of the claim of abandonment only through a quo warranto proceeding brought for that purpose (R. 257-258).

State vs. Minnesota Central R. Co., 36 Minn. 246, 258.

Richards vs. Minnesota Savings Bank, 75 Minn. 196.

Cf. *State vs. W. L. Harris Realty Co.*, *supra*.

It is respectfully submitted that the petition should be denied.

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^{3a}See footnote 1a on p. 7.

